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Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 52

ARCH R. EVERSON, APPELLANT,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER, ET AL.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

FILED MARCH 4, 1946.

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INDEX

	Original	Print
Record from Supreme Court of New Jersey	1	1
Writ of certiorari	1	1
Allocatur	2	1
Acknowledgment of service	2	1
Notice to take depositions	3	2
Affidavit of service	4	3
Return to writ	11	7
Resolution of Board of Education of Township of Ewing	12	8
Reasons relied upon by prosecutor	13	8
Depositions	16	10
Caption and appearances	16	10
Colloquy	17	10
Witnesses for prosecutor:		
Arch R. Everson:		
Direct	19	12
Charles Garfield Latham:		
Direct	20	12
Cross	26	18
John Joseph Endebrock:		
Direct	32	23
Cross	33	23
Certificate of Commissioner	35	24

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—5630

	Original	Print
Record from Supreme Court of New Jersey—Continued		
Notice of application to amend writ	36	25
Notice of argument	38	26
Affidavit of John W. Kira	40	27
Order amending writ of certiorari	49	32
Opinion of Justice Parker	51	34
Dissenting opinion of Justice Heher	56	37
Rule setting aside resolution of the respondent board of Education	62	41
Notice of appeal	63	42
Grounds of appeal	65, 67	43, 44
Order amending title of grounds of appeal	69	44
Proceedings in Court of Errors and Appeals of New Jersey	71	45
Opinion of Chancellor	71	46
Dissenting opinion, Case, J.	78	51
Rule for reversal and remittitur	90	62
Application for leave for reargument (omitted in printing	92	
Order denying application for reargument	101	63
Petition for appeal	103	63
Assignments of error	105	64
Order allowing appeal	108	65
Bond on appeal (omitted in printing)	110	
Citation (omitted in printing)	115	
Order recalling remittitur	117	66
Praecipe for transcript of record	121	67
Amended praecipe	124	68
Clerk's certificate (omitted in printing)	127	
Statement of points to be relied upon and designation of parts of record to be printed	128	69
Order noting probable jurisdiction	130	70

[fol. 1] IN SUPREME COURT OF NEW JERSEY

WRIT OF CERTIORARI—Filed August 19, 1943

New Jersey, to wit: The State of New Jersey, to the Board of Education of the Township of Ewing, in the County of Mercer—Greeting:

We being willing, for certain reasons, to be certified of a certain action of the Board of Education of the Township of Ewing, in the County of Mercer, in agreeing to pay the cost of transportation of certain pupils from said Township to St. Mary's Cathedral High School, St. Hedwigs Parochial School, St. Francis School, and Trenton Catholic Boys High School, at a cost of approximately $859.80 for the school year 1942-1943, and in paying a portion thereof and agreeing to pay the remainder thereof, do command you that you certify and send under your seal, to our Justices of our Supreme Court of Judicature, at Trenton, on the nineteenth day of August, 1943, all the proceedings, records, and papers dealing with said action of said Board of Education, together with all things touching and concerning the same, as fully and completely as they remain before you, together with this, our writ, that we may cause to be done thereupon what of right and justice and according to the laws of the State of New Jersey ought to be done.

Witness, Thomas J. Brogan, Chief Justice of our Supreme Court, at Trenton, this 5th day of August, 1943.

James J. Gavin, Clerk.

Powell & Parker, Attorneys for Prosecutor.

[fol. 2] ALLOCATUR

The within writ is allowed. Let it be sealed. Either side may take depositions on two days' notice to the other.

Charles W. Parker, Justice of the Supreme Court.

July 31, 1943.

ACKNOWLEDGMENT OF SERVICE

Service of the within writ and allocatur is hereby acknowledged, this thirteenth day of August, 1943.

William Abbotts, Attorney for the Board of Education of the Township of Ewing, in the County of Mercer.

[fol. 2a] (Endorsement on Writ:) New Jersey Supreme Court. Arch R. Everson, Prosecutor, vs. The Board of Education of the Township of Ewing, in the County of Mercer and State of New Jersey; Florence S. Higgs, Julia Hoy, Anna Kendall, Anna Kopezynski, Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter, James F. Hughes, Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs, James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan, Respondents. On Certiorari. Writ of Certiorari Allocatur. Powell & Parker, 117 Main Street, Mt. Holly, N. J., Attorneys for Prosecutor.

[fol. 3] IN SUPREME COURT OF NEW JERSEY

ARCH R. EVERSON, Prosecutor,

vs.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, et al., Respondents

NOTICE TO TAKE DEPOSITIONS—Filed August 20, 1943

To the Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy, Anna Kendall, Anna Kopezynski, Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter, James J. Hughes, Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs, James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:

Please take notice, that the prosecutor in the above entitled cause will pursuant to an order of the Court heretofore made in the above stated cause, take the depositions and introduce the exhibits on his part, before William N. Cooper, Esquire, a Supreme Court Commissioner, at his office, 1 West State Street, Trenton, New Jersey, at ten o'clock in the forenoon, on Monday, August 23, 1943.

Respectfully yours, Powell & Parker, Attorneys for Prosecutor.

[fol. 4] ACKNOWLEDGMENT OF SERVICE

Service of the within notice is hereby acknowledged, this 13th day of August, 1943.

William Abbotts, Attorney for the Board of Education of the Township of Ewing, in the County of Mercer.

IN SUPREME COURT OF NEW JERSEY

[Title omitted]

AFFIDAVIT OF SERVICE—Filed August 20, 1943

STATE OF NEW JERSEY,
County of Mercer, ss:

John W. Kira, of full age, being duly sworn according to law, upon his oath deposes and says that:

1. I am a Deputy Sheriff of the County of Mercer in the State of New Jersey.

[fol. 5] 2. On Thursday, August 12, 1943, I personally served Florence S. Higgs with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to her at 53 Bank Street, Trenton, New Jersey, and explaining the contents thereof to her.

3. On the same day, I personally served Julia Hoy (whose correct name is Grace Hoy) with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 1582 Pennington Road, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

4. On the same day, I served Anna Kopezynski (whose correct name is Josephine Kopezynski) with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her father, Walter Paradowski, at her home, 1830 Pennington Road, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to him.

5. On the same day, I personally served Anna Kendall (whose correct name is Grace Kendall) with a true copy of

writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 6 Rutledge Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

6. On the same day, I personally served Julia Lydon, with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at Brookfield and N. Olden Avenues, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

[fol. 6] 7. On August 11, 1943, I personally served Frances Smith with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 345 Beechwood Avenue, Ewing Township, R. D., Trenton, New Jersey, and explaining the contents thereof to her.

8. On the same day, I personally served Anna Williams with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 51 Ellsworth Avenue, Trenton, New Jersey, and explaining the contents thereof to her.

9. On the same day, I personally served Anna Kelly with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her sister, Mrs. Huley at their home, Lower Ferry Road and Stuyvesant Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

10. On August 12, 1943, I personally served Ruth O'Brien with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at Ewing Township Hall, R. D. Trenton, New Jersey and explaining the contents thereof to her.

11. On August 11, 1943, I served Paul H. Barr with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to his wife, at his home on Carlton Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

[fol. 7] 12. On the same day, I served Mary Harter (whose correct name is Helen Harter) with a true copy

of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her husband, at her home 26 Summit Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to him.

13. On the same day, I personally served James F. Hughes with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to him at 54 Harrop Place, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to him.

14. On August 12, 1943, I personally served Mary E. Ryan with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 16 Rutledge Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

15. On August 12, 1943, I personally served Catherine Wieger with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at Allison Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

16. On August 11, 1943, I personally served Bertha Brodowski with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 430 Greenway Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

[fol. 8] 17. On August 12, 1943, I served John P. Sweeney with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to his wife at his home on Sutherland Road, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

18. On August 11, 1943, I served August F. Jacobs with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to his wife at his home 30 Iowana Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

19. On the same day, I served James H. Williams with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to his wife at his home 314 Beechwood Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

20. On August 16, 1943, I personally served Sarah Hills with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to her at 22 Summit Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

21. On August 12, 1943, I personally served Victoria Domanski with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to her at 440 Weber Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

[fol. 9] 22. On the same day, I served Robert J. Ryan with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to his wife at his home 1816 Pennington Road, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

23. On the same day, I personally served William Ryan with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to him at 16 Rutledge Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to him.

Annexed hereto, made a part hereof and filed herewith is a true copy of the notice to take depositions referred to hereinabove.

John W. Kira.

Sworn to and subscribed before me this twentieth day of August, 1943.

Lena M. Booz, Notary Public, N. J.

[fol. 10] NOTICE ANNEXED TO FOREGOING AFFIDAVIT

[Title omitted]

To the Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy, Anna Kendall, Anna Kopezynski, Julia Lydon, Frances Smith, Ana Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter, James J. Hughes, Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs, James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:

PLEAE TAKE NOTICE, that the prosecutor in the above entitled cause will, pursuant to an order of the Court heretofore made in the above stated cause, take the depositions and introduce the exhibits on his part, before William N. Cooper, Esquire, a Supreme Court Commissioner, at his office, 1 West State Street, Trenton, New Jersey; at ten o'clock in the forenoon, on Monday, August 23, 1943.

Respectfully yours, Powell & Parker, Attorneys for Prosecutor.

[fol. 11] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

RETURN TO WRIT—Filed August 19, 1943

To the Honorable the Justices of the Supreme Court of Judicature of New Jersey:

I, C. G. LATHAM, District Clerk of the Board of Education of the Township of Ewing, in the County of Mercer, in obedience to the command of the writ hereto annexed, directed to the said The Board of Education of the Township of Ewing, in the County of Mercer, do hereby certify and send to you, the said Justices, the proceedings, records, and papers dealing with the certain action of said Board of Education of the Township of Ewing, in the County of Mercer, in agreeing to pay the cost of transportation of certain pupils from said Township to St. Mary's Cathedral High School, St. Hedwigs Parochial School, St. Francis School, and Trenton Catholic Boys High School, at a

cost of $859.80, for the school year 1942-1943, and in paying a portion thereof and agreeing to pay the remainedr thereof.

[fol. 12] In witness whereof, I have hereunto set my hand the seal of the said The Board of Education of the Township of Ewing, in the County of Mercer, this 19th day of August, 1943.

C. G. Latham, District Clerk.

SCHEDULE

I, C. G. LATHAM, District Clerk of the Board of Education of the Township of Ewing, in the County of Mercer, do hereby certify that at a regular meeting of The Board of Education of the Township of Ewing, in the County of Mercer, on September 21, 1942, the following action was taken in accordance with the minutes of said meeting:

> "The Transportation Commtt. recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic Schools, by way of public carriers as in recent years. On Motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted."

C. G. Latham, District Clerk.

[fol. 13] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

REASONS, RELIED UPON BY PROSECUTOR—Filed August 20, 1943

Arch R. Everson, the Prosecutor in the above entitled matter, relies upon the following reasons in his application to have set aside and for nothing holden the action of the Board of Education of the Township of Ewing, in agreeing to pay the costs of transportation of certain pupils from said Township to St. Mary's Cathedral High School, St. Hedwigs Praochial School, St. Francis School, and Trenton Catholic Boys High School at a cost of approximately $859.80 for the school year 1942-1943, and in paying a portion thereof and agreeing to pay the remainder thereof;

I. Said action of said Board of Education, which was taken pursuant to authority purported to be given by vir-

tue of the provisions of 18:14-8 of the Revised Statutes of New Jersey, as amended by Chapter 191 of the Laws of 1941, is illegal and void and said action and said Chapter 191 of the Laws of 1941 invade the constitutional rights [fol. 14] of prosecutor as a taxpayer within the taxing district of the Township of Ewing, and all other taxpayers similarly situated, and said statute is wholly void and unconstitutional for the following reasons:

(a) Said statute violates the provisions of Article 1, Paragraph 3, of the Constitution of New Jersey, in that it permits the raising of money by taxation for the maintenance of a religious ministry.

(b) Said statute violates Article 1, Paragraph 4, of the Constitution of New Jersey, in that is would permit the establishment of one religious sect in preference to another.

(c) Said statute violates the principle of complete separation of church and state enunciated in Article 1, Paragraph 3, and Article 1. Paragraph 4, of the Constitution of New Jersey, in that it purports to authorize the use of public moneys to pay the costs of transportation to private sectarian schools.

(d) Said statute violates Article 1, Paragraph 19, of the Constitution of New Jersey, in that it purports to authorize a gift of public moneys to or in aid of individuals, associations, or corporations.

(e) Said statute violates Article 1, Paragraph 20, of the Constitution of New Jersey, in that it purports to authorize an appropriation of public money to or for the use of societies, associations, or corporations.

(f) Said statute violates Article 4, Section 7, Paragraph 6, of the Constitution of New Jersey, in that it purports to authorize the use of public school funds of the State and [fol. 15] the local school districts for a purpose other than the maintenance and support of public free schools.

(g) Said statute violates the provisions of the Fourteenth Amendment of the Constitution of the United States.

2. Said action of said Board of Education and said statute are in divers other respects illegal and unconstitutional and should be set aside and for nothing holden.

Powell & Parker, Attorneys for Prosecutor.

[fol. 16] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

Depositions

Depositions taken before William N. Cooper, Esq., Supreme Court Commissioner, on the 23d day of August, 1943, at the hour of ten o'clock in the forenoon; said depositions having started at his office, 503 First Mechanics National Bank Building, Trenton, N. J., and because of the number of people appearing was adjourned to the Assembly Room on the fifth floor of said First Mechanics Bank Building.

Depositions were taken in pursuance of notice given.

[fol. 17] APPEARANCES:

Powell & Parker, Esqs., by Albert McKay, Esq., for Prosecutor.

William Abbots, Esq., for Board of Education of the Township of Ewing.

I, Marion H. Sweetman, hereby certify that the attached transcript is a true and accurate copy of my stenographic notes taken before William N. Cooper, Esq., a Supreme Court Commissioner of the State of New Jersey, at his office 503 First Mechanics Bank Building, Trenton, N. J., on August 23, 1943.

Marion H. Sweetman.

It is stipulated that signatures to the depositions are waived, and that the said depositions shall be certified to by the stenographer.

(Marion H. Sweetman, C. S. R., was duly sworn as the stenographer,)

COLLOQUY

The Commissioner: Will you, please, answer to your names and tell us whether or not you are represented by any counsel?

Are there any attorneys here representing anyone?

If the name is not absolutely correct, please let me know whether the name is correct or incorrect.

Florence S. Higgs; not present and not represented by counsel.

Julia Hoy (correct name Grace Hoy); not present and not represented by counsel.

[fol. 18] Anna Kendall (correct name Grace Kendall); not present and not represented by counsel.

Anna Kopezynski (correct name Josephine Kopezynski); not present and not represented by counsel.

Julia Lydon; not present and not represented by counsel.

France Smith (correct name Frances Smith); not present and not represented by counsel.

Anna Williams; not present and not represented by counsel.

Anna Kelly; not present and not represented by counsel.

Ruth O'Brien, appearing personally.

Paul H. Barr, appearing personally.

Mary Harter (correct name Helen Harter), appearing personally.

James F. Hughes (correct name James T. Hughes), appearing personally.

Mary E. Ryan; not present and not represented by counsel.

Catherine Wieger, appearing personally.

Bertha Brodowski, not present and not represented by counsel; her husband.

Edmund F. Brodowski, appearing personaly.

John P. Sweeney, not present and not represented by counsel.

August F. Jacob (correct name August Jacob) appearing personally.

James H. Williams, not present and not represented by counsel.

Sarah Hills; not present and not represented by counsel.

Victoria Domanski; not present and not represented by counsel.

Robert J. Ryan; not present and not represented by counsel.

[fol. 19] William Ryan; not present and not represented by counsel.

Those of you who have appeared are parties defendant in this action. You are not represented by counsel, and I will give you the opportunity to ask any questions that you want to put on the record.

A stipulation has been made by counsel present that the testimony will be taken, the signature of the witness is waived, and the certificate of the stenographer will be issued.

Are you all satisfied that that be done?

ARCH R. EVERSON, being duly sworn, deposes and says as follows:

Direct examination.

By Mr. McKay:

Q. What is your address, Mr. Everson?
A. 508 Maple Avenue, Ewing Township.
Q. That is Mercer County?
A. That is right.
Q. Do you own your home at that address?
A. I do.
Q. And you pay taxes on that property to the Township of Ewing?
A. That is right.

Mr. McKay: That is all.
Mr. Abbotts: No questions.
The Commissioner: Is there anyone present who desires to ask this gentleman any questions on anything that he has testified to?

(No response.)

Mr. McKay: Mr. Commissioner, there was one question I should have asked Mr. Everson that I did not. I wonder if counsel has any objection.
Mr. Abbotts: No.

[fol. 20] Q. Mr. Everson, are you the prosecutor in this proceeding?
A. Yes.

Mr. McKay: That is all.

CHARLES GARFIELD LATHAM, being duly sworn, deposes and says as follows:

Direct examination.

By Mr. McKay:

Q. Mr. Latham, are you connected with the Board of Education of the Township of Ewing, in the County of Mercer?
A. I am.
Q. What is your position?
A. District Clerk.

Q. Will you please, refer to the minutes of the meeting of the Board of Education of the Township of Ewing held on September 21, 1942?

A. Yes.

Q. Do you find there a resolution authorizing payment of the cost of transportation of certain pupils from the Township of Ewing to certain private schools in the City of Trenton?

A. Do you mean by private schools, parochial schools?

Q. Yes.

A. Yes, I find it here.

Q. Will you read that resolution, please?

A. (Reading:) "The transportation committee recommended the transportation of pupils of Ewi g to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier as in recent years. On Motion of Mr. Ralph Ryan and Mr. M. French the same was adopted."

Q. Mr. Latham, after the adoption of this resolution, were certain applications received from parents of children who desired to send their children from the Township to certain parochial schools in the City of Trenton?

[fol. 21] A. Yes. I say yes to that. The applications were made, and they were carried on renewal each year.

Q. Didn't certain pupils thereafter from the Township of Ewing attend certain parochial schools in the City of Trenton?

A. They did.

Q. Do you have a record of any payments made to parents to reimburse them for the cost of transportation of pupils from the Township of Ewing to parochial schools in the City of Trenton?

A. I do.

Q. When were those payments made?

A. They were made the first five months and second five months' period. They are made about February, after January's attendance comes in. It is somewhere around the middle of February, or the 15th, when they go out.

Q. Will you, please, refer to your records and tell me whether you have a record of pupils from the Township of Ewing attending St. Hedwig's parochial school in the City of Trenton?

A. I do.

Q. Will you, please, give us a list of the payments made for transportation of such pupils from Ewing Township

to that school, giving the name of the parent, the name of the pupil, and the amount?

A. Victoria Domanski, daughter, Dorothy, $19.36; Victoria Domanski, Arthur, $19.36; Victoria Domanski, Robert, $19.36.

Q. Those payments were made, were they not, to reimburse Victoria Domanski for the cost of transportation of her three children from the Township to St. Hedwig's parochial school in the City of Trenton?

A. Right.

Q. Will you refer to your records, please, and tell me whether you have a record of certain payments made to parents for transportation of their children from the Township to St. Francis parochial school in the City of Trenton?

A. I have.

[fol. 22] Q. Will you, please, give us a list of the payments that were made, giving the name of the parent, the name of the pupil, and the amount that was paid?

A. Yes. This name since that has been changed here because the name was Mrs. Karl Harter.

Q. Give it.

A. Mrs. Karl Harter, Frances, daughter, $17.80. Mrs. Karl Harter, Karl, $17.80.

Q. Those payments were made, were they not, to reimburse Mrs. Karl Harter for cost of transportation for her children from the Township of Ewing to St. Francis parochial school in the City of Trenton?

A. That is right.

Q. Will you, please, refer to your records again and tell me whether you have a record of payments made to parents to reimburse them for cost of transportation of their children from the Township to the Catholic Boys' High School in the City of Trenton?

A. Yes, I have that record.

Q. Will you, please, give us a list of the payments that were made, giving the name of the parent, the name of the pupil, and the amount that was paid?

A. Mrs. E. R. Kendall, son Robert, $17.60.

Mrs. A. Kopeczynski, Alexander, $16.50.

Frances J. Smith, for Frances, $18.26.

Mrs. James H. Williams, for James, $9.90.

Q. Will you, please, refer to your records again and tell us whether you find a record of payments having been made

to certain parents to reimburse them for costs of transportation of their children from the Township of Ewing to St. Mary's Cathedral High School in the City of Trenton?

A. I have it.

Q. Will you, please, give us a list of the payments that were made, giving the name of the parent, the name of the [fol. 23] pupil, and the amount that was paid?

A. Bertha K. Brodowski, for daughter Irene, $15.80.
James T. Hughes, for Alice, $18.20.
Mrs. Karl Harter, for Helene, $18.60.
Mrs. Karl Harter, for Hildegarde, $18.60.
August Jacob, for Margaret, $18.40.
Anna Kelly, for Barbara, $17.80.
Ruth O'Brien, for Joanne, $17.20.
William J. Ryan, for Mary, $18.00.
Mrs. James H. Williams, for Ann, $9.20.
Catharine Wieger, for Marie, $18.60.
John P. Sweeney, for Eileen Hogan, $5.20.
Paul H. Barr, for Lillye, $18.60.
Robert Ryan, for Kathleen, $17.60.

Q. Mr. Latham, those payments that you just read were made to parents covering transportation for the first half of the school year, commencing September, 1942, were they not?

A. That is right.

Q. Have any payments been made to parents of children attending parochial schools for transportation covering the last half of the school year commencing September, 1942?

A. No.

Q. Have certain pupils from the Township of Ewing been attending Catholic parochial schools in the City of Trenton during the last half of that year?

A. Yes.

Q. Why haven't they been reimbursed?

A. On advice of counsel not to pay the second half.

Q. That advice of counsel was given to the Board of Education after this proceeding was instituted, wasn't it?

A. Yes, that is right.

Q. Do you have a record of the pupils from Ewing Township who have been attending parochial schools in the City of Trenton during the last half of the school year, 1942?

A. Yes.

Q. Will you refer to your records, please, and tell me the names of the parents of such children, the name of the

[fol. 24] pupil, and your record of the attendance at St. Hedwig's parochial school for the last half of the school year commencing September, 1942?

A. Victoria Domanski, parent, for Dorothy Domanski; I have a record of attendance for February, March and April, and none for May, and June.

Q. When you say "none for May or June," does that mean that you have not received a report from the school as to attendance?

A. That is right.

Q. Will you, please, proceed with the list of the names of pupils attending the school for the last half of the school year ending June 30, 1943?

A. Victoria Domanski, for Arthur, attendance for February, March, and April, and none for May and June.

Q. When you say "none for May and June," do you mean that you have not received the record from the school?

A. That is right.

Q. Will you proceed with the list, please?

A. Victoria Domanski, for Robert, attendance for February, March, and April, No report on May and June.

Q. Will you, please, refer to your records and give me a list of the pupils attending St. Francis parochial school from the Township of Ewing during the last half of the school year ending June 30, 1943, giving the name of the parent, the pupil, and your record of the attendance?

A. Mrs. Karl Harter, for Francis, a record of February, March, April, May, and June. Mrs. Karl Harter, for Karl, record complete, February, March, April, May, and June.

Q. Do you have a record of certain pupils from the Township of Ewing attending the Catholic Boys' high school [fol. 25] in the City of Trenton during the last half of the school year ending June 30, 1943?

A. Yes, I do.

Q. Will you, please, give us a list of those pupils, giving the name of the parent, the name of the pupil, and your record of the attendance at the school?

A. Mrs. E. R. Kendall, for Robert, report for February, March, April, and May. No report on June.

Mrs. A. Kopszynski, for Alexander, report for February, March, April, and May. None for June.

Q. When you say "none for June," you mean that you have not received a report from the school?

A. No report.

Mrs. Frances J. Smith, for Frances, report for February, March, April, and May, but no attendance report for June.

Mrs. James A. Williams, for James, no report at all, boy having left November 21, 1942.

Q. Will you, please, refer to your records again and give us a list of the pupils from the Township of Ewing who attended St. Mary's Cathedral high school in the City of Trenton during the last half of the school year ending June 30, 1943, giving the name of the parent, the name of the pupil, and your record of attendance at that school.

—. Bertha K. Brodowski, for Irene, attendance report for February, March, April, and May. No report on June.

James T. Hughes, for Alice, report on February, March, April, and May, but no report for June.

Mrs. Karl Harter, for Helene, report for February, March, April, and May. No report on June.

Mrs. Karl Harter, for Hildegarde, report for February, March, April, and May. No report for June.

August Jacob, for Margaret, report for February, March, April, and May. No report on June.

[fol. 26] Mrs. Anna Kelly, report for Barbara, report for February, March, April, and May. No June report.

Mrs. Ruth O'Brien, for Joanna (sic), report for February, March, April, and May. No report for June.

Mrs. Mary E. Ryan, for Mary, report for February, March, April, and May. No report for June.

Mrs. James H. Williams, for James, no report, having moved from Township.

Mrs. Catherine Wieger, for Marie, report for February, March, April, and May. None for June.

John J. Sweeney, for Eileen Hogan, no report, having left school.

Paul H. Barr, for Lillye, report for February, March, April, and May. No report on June.

Robert J. Ryan, for Kathleen, report for February, March, April, and May. No report on June.

Q. Mr. Latham, isn't it a fact that payments would have been made to the parents to reimburse them for costs of transportation during the last half of the school year ending June 30, 1943, if Mr. Abbotts had not advised the Board of Education to withhold payment pending this proceeding?

A. Do you mean it would have been paid?

Q. Yes.

A. Well, I suppose it would. If counsel had not advised against it, it probably would have been paid.

Q. It probably would have been paid if Mr. Abbotts had not advised against it?

A. Yes, Mr. Abbotts, after reading these proceedings, advised against payment while these were going on.

Mr. McKay: That is all.

Cross-examination.

By Mr. Abbotts:

Q. Mr. Latham, the school law provides for the payment [fol. 27] of costs of transportation, provided that the children involved are transported a certain distance. You know of the existence of that law, don't you?

A. Yes.

Q. Was anything done to check up on the distance that it was necessary to be traveled by these children who were going to the parochial schools before they were put in line for payment of that transportation?

A. Yes.

Q. Who checked the distance?

A. I did, the District Clerk.

Q. Did you find that all of the children who were being put in line for payment for their transportation had need to travel the required distance?

A. I did.

Q. You have testified to certain payments being made to the parent involved for the transportation of the children, whose names you have given, to the parochial schools. Were those payments actually made by the Board of Education to the parents involved?

A. Yes.

Q. Were the payments of those sums authorized by the Board of Education?

A. Yes.

Q. Can you refer to your minutes and tell us when they were authorized?

A. The minutes show on Monday, February 15, 1943, the Board authorized the payment of a transportation bill for the first half of high school and elementary at Trenton, to the amount of $8,034.95.

Q. Did that sum of $8,034.95 include the payment to the people whose names you read off and the amounts?

A. Yes, it did.

Q. Was there any transportation of pupils from Ewing Township to schools other than the parochial schools involved?

A. Trenton High Schools, both junior and senior.

Q. The setup in Ewing Township so far as grades are concerned goes how far?

A. The eighth grade.

[fol. 28] Q. And pupils who want to go to school beyond the eighth grade, what do you do with them?

A. They go to the City of Trenton and some to Pennington.

Q. Do you pay the cost of tuition?

A. Yes.

Q. During the school year from beginning July 1, 1942, and ending June 30, 1943, what tuition did you pay for pupils going to schools other than the parochial schools?

A. Do you mean the total sum?

Q. No. The individual amounts?

A. $175 and $195.

Q. What do you pay to the City of Trenton?

A. Junior schools $175 and senior schools $195.

Q. Those pupils that you send to Pennington, how much do you pay for tuition?

A. $128 a year for all grades.

Q. Then in addition to the payment for tuition, did you make any payments for transportation to those pupils who were going to the Trenton Senior High and the Trenton Junior High and the Pennington school?

A. Yes, we made payments to them.

Q. In accordance with the law?

A. That is right.

Q. Do you know how many of the pupils who were transported to the parochial schools were of high school grades?

A. Yes, I can tell by my cards here.

Q. Do you know how many were of elementary grades?

A. Yes.

Q. Will you tell me how many pupils that were transported to the parochial schools were of elementary grade?

A. Five; two to St. Francis and three to St. Hedwig's.

Q. And all of the other pupils who were transported to parochial schools were of high school grade, is that correct?

A. Right.

[fol. 29] Q. Would it have been necessary under the law to have paid the cost of transportation of the pupils of high school grade if they had gone to the public school as furnished by Ewing Township, namely, to the Trenton Junior and Senior high schools?

A. I did not just get that. Do you mean the elementary?

Q. No. Would you have paid the transportation to the Trenton Senior and Junior high schools of those pupils who were going to the parochial high schools if they had not gone to parochial schools but had gone to the facilities which you were furnishing, namely, the Trenton high schools?

A. Yes.

Q. And if they had not gone to parochial schools but had gone to the public schools, which you were furnishing, namely, the Trenton high schools, you would also have paid their tuition, is that correct?

A. That is correct.

Q. As I understand it, you did not pay anything for tuition for these pupils who went to the parochial schools?

A. No.

Q. Just to clear up one point. Your records for attendance at the parochial schools is not complete for the second half of the school year beginning July 1, 1942, and ending June 30, 1943; is that correct?

A. That is right.

Q. I take it that if I had not advised the school board not to make payments you would have had those records complete?

A. I would have gone to the school and got them.

Q. And after having them completed would you have presented the report of the cost to the school board for payments?

A. Yes.

Q. Mr. Latham, how are the children who are transported to Trenton high school, whether senior or junior, transported?

A. By public carrier, bus.

[fol. 30] Q. In other words, they take the public carrier conveyance, is that right?

A. That is right.

Q. How are they reimbursed for that cost of transportation?

A. By report of the high school on their monthly attendance, which I check on the back of these cards, and at the end of five months it is added up and they are paid according to what it costs, 22 cents a day or 20.

Q. You mean that the pupil involved pays his or her own transportation on the public carrier, and is——

A. And reimbursed after five months.

Q. And reimbursed for the number of days of actual attendance as shown by the report coming from the school?

A. That is right.

Q. What is the cost of the transportation per day?

A. It varies according to the schools they go to.

Q. What is the reason for the variance?

A. Some do not have to take a transfer.

Q. And those who do not have to take a transfer, what is the actual cost?

A. Ten cents. 20 cents a day. Ten cents each way. But the Board provides a penny for transfer purposes for those who go to town and have to transfer over to Central high school.

Q. Can you tell us in transporting to what schools is a transfer necessary?

A. Well, you see now you are speaking of all schools. The parochial schools—St. Mary's it is 20 cents; but the Boys Catholic high school is 22 cents because they go in the center of town and must take a transfer on Chambers Street or Chestnut I think it is.

Q. And for that transfer they must pay one cent each way?

A. They are allowed one cent each way.

Q. Is it upon the same basis, namely, a report of days actually attended at the school that you have paid the cost [fol. 31] of transportation to those who have gone to the parochial schools as listed by you?

A. That is right.

Q. The 20 cents a day or 22 cents a day is a round trip?

A. That is a round trip.

Q. In other words, the ordinary 1 zone bus fare in Trenton, and including Ewing Township, is 10 cents?

A. Yes.

Q. And 1 cent for a transfer to another line?

A. That is right.

Mr. Abbotts: That is all.

The Commissioner: Does any person present desire to ask the witness any questions?

Father Endebrock: I would like to make a correction in one of his statements.

The Commissioner: Just a moment. You cannot correct a witness. You can testify, if you wish. You can only ask the witness a question whether or not his answer is correct.

If you wish to do that you may do it. Just ask the witness the question, please.

Father Endebrock: Speaking of the children of Mrs. Williams attending the Catholic Girls high school you said James rather than Ann. It does not make much difference but it would look rather odd to say James attended a girls' high school.

The Witness: There are two Williamses. One goes to the boys' school and that is James.

Father Endebrock: The first time you had it correct and then when you repeated "Mrs. James Williams" you said "James" rather than "Ann."

[fo] 32] The Witness: That is because the card got in the wrong place.

The Commissioner: Suppose you ask the question.

Mr. McKay: I would prefer to ask that question rather than have Father Endebrook ask it as I am not so sure that he has the right to question the witness.

The Commissioner: Do you have any objection to counsel asking the question?

Father Endebrock: No.

By Mr. McKay:

Q. Mr. Latham, when you testified relative to the attendance of pupils at St. Mary's Cathedral high school you testified that James Williams was one of the pupils; is that correct, or should it have been Ann?

A. It should have been Ann.

JOHN JOSEPH ENDEBROCK, being duly sworn, deposes and says as follows:

Direct examination.

By Mr. McKay:

Q. Father Endebrock, are you in any way connected with the Catholic parochial schools in the City of Trenton?

A. Yes, I am.

Q. What is your position, Father?

A. I am Superintendent of the parochial schools throughout the Diocese of Trenton, which includes the City of Trenton.

Q. Are Catholic Boys high school and St. Mary's Cathedral high school, St. Francis school, St. Hedwig's parochial school all Roman Catholic parochial schools in the City of Trenton?

A. They are.

[fol. 33] Q. Father Endebrock, are you familiar with the curricula in those schools?

A. Yes.

Q. Is religion taught as part of the curricula?

A. Yes, it is.

Q. In each one of the schools that I mentioned?

A. Yes.

Mr. McKay: That is all.

Cross-examination.

By Mr. Abbotts:

Q. Father Endebrock, the schools which have been mentioned by counsel, are they conducted in whole or in part for profit?

A. No.

Q. Not at all.

A. The only money taken in is what is paid by the parents, or the parish for the maintenance of the school, but they all operate at a loss.

Mr. Abbotts: That is all.

The Commissioner: Does anyone have any questions that they desire to ask Father Endebrock?

(No response.)

Mr. McKay: I was wondering if any of the defendants had come in since the hearing started.

The Commissioner: Has anyone come in since I read out the names?

(No response.)

The Commissioner: Has anyone here been made a party defendant by order of the court?

This testimony has been taken in pursuance of a notice given. I do not know whether I should give you the opportunity of offering any testimony you have, but if counsel [fol. 34] have no objection if anybody has any testimony that you want to offer, unless counsel do object I will give you an opportunity of doing so.

Mr. McKay: I have no objection, and I think that any defendant here is entitled to put in his or her testimony.

The Commissioner: I think so. Do any of the ladies or gentlemen have any testimony to give which you think has not been covered?

Of course, you understand this is only a preliminary hearing to take testimony to go before the Court. Certain facts have to be presented before the Court and if those facts are as you believe them and you have no contradictory testimony I presume you have nothing to offer.

Make a note I made the offer and no one desires to present any testimony.

Mr. McKay: There is only one thing further I have in mind. I would like to talk with Mr. Abbotts a moment if I may.

(Conference between counsel.)

Mr. McKay: I think that is all, Mr. Commissioner.

The Commissioner: The taking of the testimony is now adjourned.

[fol. 35] CERTIFICATE OF SUPREME COURT COMMISSIONER

STATE OF NEW JERSEY,
County of Mercer, ss.:

I, William N. Cooper, Supreme Court Commissioner, do hereby certify that the foregoing depositions were taken before me on the twenty-third day of August, 1943, at the hour of ten o'clock in the forenoon, in pursuance of the cer-

tificate of Marion H. Sweetman hereto attached; that the witnesses were duly sworn to testify to the truth, the whole truth, and nothing but the truth, and did depose to the matters contained in the foregoing depositions; that the said testimony was taken stenographically by the said Marion H. Sweetman in my presence.

William N. Cooper, Supreme Court Commissioner.

[fol. 36] In Supreme Court of New Jersey

[Title omitted]

Notice of Application to Amend Writ—Filed September 20, 1943

To the Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy (whose correct name is Grace Hoy), Anna Kendall (whose correct name is Grace Kendall), Anna Kopezynski (whose correct name is Josephine Kopezynski), Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter (whose correct name is Helen Harter), James F. Hughes (whose correct name is James T. Hughes), Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs (whose correct name is August Jacob), James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:

Please take notice, that on Tuesday, October 5, 1943, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall apply to the New Jersey Supreme Court, at the State House, Annex, in the City of Trenton, [fol. 37] New Jersey, for an order amending the writ of certiorari in the above entitled matter by striking out the names of Julia Hoy, Anna Kendall, Anna Kopezynski, Mary Harter, James F. Hughes and August F. Jacobs, respondents in the above entitled matter, and substituting in place thereof their correct names as follows: Grace Hoy, Grace Kendall, Josephine Kopezynski, Helen Harter, James T. Hughes and August Jacob, respectively.

Respectfully yours, Powell & Parker, Attorneys for Prosecutor.

ACKNOWLEDGMENT OF SERVICE

Service of the within notice is hereby acknowledged this third day of September, 1943.

William Abbotts, Attorney for the Board of Education of the Township of Ewing, in the County of Mercer.

[fol. 38] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

NOTICE OF ARGUMENT—Filed September 20, 1943

To William Abbotts, Esq., Attorney for Respondent, Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy (whose correct name is Grace Hoy), Anna Kendall (whose correct name is Grace Kendall), Anna Kopezynski (whose correct name is Josephine Kopezynski), Julia Lydon, Francis Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter (whose correct name is Helen Harter), James F. Hughes (whose correct name is James T. Hughes), Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs (whose correct name is August Jacob), James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:

Please take notice of argument of the above entitled cause before the New Jersey Supreme Court, to be held at the [fol. 39] State House Annex, in the City of Trenton, New Jersey, on the 5th day of October, 1943, at ten o'clock in the forenoon, or as soon thereafter as the same can be heard by said Court.

Powell & Parker, Attorneys for Prosecutor.

Dated: September 3, 1943.

ACKNOWLEDGMENT OF SERVICE

Service of the within notice of argument is hereby acknowledged this third day of September, 1943.

William Abbotts, Attorney for the Board of Education of the Township of Ewing, in the County of Mercer.

[fol. 40] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

AFFIDAVIT OF JOHN W. KIRA—Filed September 20, 1943

STATE OF NEW JERSEY,
County of Mercer, ss.:

John K. (*sic*) Kira, of full age, being first duly sworn according to law, upon his oath deposes and says:

1. That on Tuesday, September 7, 1943, I personally served Florence S. Higgs with true copies of notice of argument and notice of application to amend writ of certiorari in the above entitled matter, by handing the same to her at 53 Bank Street, Trenton, New Jersey, and explaining the contents thereof to her.

2. On the same day, I personally served Anna Kendall (whose correct name is Grace Kendall) with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing the same to her at 6 Rutledge Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

[fol. 41] 3. On the same day, I served Anna Kopezynski (whose correct name is Josephine Kopezynski) with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her father, Walter Pardowski, at her usual place of abode, 1830 Pennington Road, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to him.

4. On the same day, I served Julia Lydon with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing the same to her husband, Michael Lydon, at her usual place of abode, 172 Brookland Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to him.

5. On the same day, I personally served Frances Smith with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at 345 Beechwood Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

6. On the same day, I personally served Anna Williams with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at 51 Ellsworth Avenue, Trenton, New Jersey, and explaining the contents thereof to her.

7. On the same day, I served Anna Kelly with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing the same to her sister, Mary Entwistle, at the usual place of abode of said Anna Kelly, Lower Ferry Road, Ewing Township, Mercer [fol. 42] County, New Jersey, and explaining the contents thereof to said Mary Entwistle.

8. On the same day, I personally served Ruth O'Brien with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at the Ewing Township Hall, Pennington Road and Green Lane, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

9. On Wednesday, September 8, 1943, I personally served Paul H. Barr with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to him at Carlton Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to him.

10. On Tuesday, September 7, 1943, I personally served Mary Harter (whose correct name is Helen Harter) with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing the same to her at 26 Summit Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

11. On the same day, I served James F. Hughes (whose correct name is James T. Hughes) with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to his wife, Alice Hughes, at his usual place of abode, 54 Harrop Place, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

12. On the same day, I served Mary E. Ryan with true copies of said notice of argument and notice of application [fol. 43] to amend writ of certiorari, by handing same to her husband, William Ryan, at her usual place of abode, 16 Rut-

ledge Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to him.

13. On the same day, I personally served Catherine Wieger with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at Allison Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

14. On the same day, I personally served Bertha Brodowski with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at 430 Greenway Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

15. On the same day, I served John P. Sweeney with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to his wife, at his usual place of abode, Sutherland Road, Ewing Township, Mercer County, New Jersey, and explaining the content thereof to her.

16. On the same day, I served August F. Jacobs (whose correct name is Augu Jacob) with true copies of said notice of argument an notice of application to amend writ of certiorari, by handing same to his wife, Maria Jacob, at his usual place of abode, 30 Iowana Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

[fol. 44] 17. On the same day, I served James H. Williams with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to his wife, Anna Williams, at his usual place of abode, 51 Ellsworth Avenue, Trenton, New Jersey, and explaining the contents thereof to her.

18. On the same day, I personally served Sarah Hills with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at 22 Summit Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

19. On the same day, I personally served Victoria Domanski with true copies of said notice of argument and

notice of application to amend writ of certiorari, by handing same to her at 440 Weber Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

20. On the same day, I served Robert J. Ryan with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to his wife, Emily Ryan, at his usual place of abode, 1816 Pennington Road, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

21. On the same day, I personally served William Ryan with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to him at 16 Rutledge Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to him.

[fol. 45] Annexed hereto and made a part hereof are true copies of the notice of argument and notice of application to amend writ of certiorari referred to herein.

John W. Kira.

Sworn to and subscribed before me this 10th day of September, 1943. Lena M. Booz, Notary Public of New Jersey.

[fol. 46] NOTICE OF ARGUMENT ANNEXED TO FOREGOING AFFIDAVIT

[Title omitted]

To William Abbotts, Esq., Attorney for Respondent, Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy (whose correct name is Grace Hoy), Anna Kendall (whose correct name is Grace Kendall), Anna Kopezynski (whose correct name is Josephine Kopezynski), Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter (whose correct name is Helen Harter), James F. Hughes (whose correct name is James T. Hughes), Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs (whose correct name is August Jacob), James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:

Please take notice of argument of the above entitled cause before the New Jersey Supreme Court, to be held at the State House Annex, in the City of Trenton, New Jersey, on the 5th day of October, 1943, at ten o'clock in the fore-
[fol. 47] noon, or as soon thereafter as the same can be heard by said Court.

Powell & Parker, Attorneys for Prosecutor.

Dated: September 3, 1943.

NOTICE ANNEXED TO FOREGOING AFFIDAVIT

[Title omitted]

To the Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy (whose correct name is Grace Hoy), Anna Kendall (whose correct name is Grace Kendall), Anna Kopezynski (whose correct name is Josephine Kopezynski), Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul N. Barr, Mary Harter (whose correct name is Helen Harter), James F. Hughes (whose correct name is James T. Hughes), Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs (whose correct name is August Jacob), James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:

Please take notice, that on Tuesday, October 5, 1943, at [fol. 48] 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall apply to the New Jersey Supreme Court, at the State House Annex, in the City of Trenton, New Jersey, for an order amending the writ of certiorari in the above entitled matter by striking out the names of Julia Hoy, Anna Kendall, Anna Kopezynski, Mary Harter, James F. Hughes and August F. Jacobs, respondents in the above entitled matter, and substituting in place thereof their correct names as follows: Grace Hoy, Grace Kendall, Josephine Kopezynski, Helen Harter, James T. Hughes and August Jacob, respectively.

Respectfully yours, Powell & Parker, Attorneys for Prosecutor.

[fol. 49] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

ORDER AMENDING WRIT OF CERTIORARI—Filed October 6, 1943

This matter being opened to the court by Powell & Parker, Attorneys for the Prosecutor, and it appearing that notice has been duly served upon all the respondents herein of an application to this court for an order amending the writ of certiorari filed herein by striking out the names of the respondents, Julia Hoy, Anna Kendall, Anna

Kopezynski, Mary Harter, James F. Hughes and August F. Jacobs and substituting their correct names in place thereof; and it further appearing to the satisfaction of the court that the correct names of said respondents are Grace Hoy, Grace Kendall, Josephine Kopezynski, Helen Harter, James T. Hughes and August Jacob, respectively, and that they have been duly served with true copies of said writ of certiorari; and William Abbotts, Esq., Attorney for the Respondent, Board of Education of the Township of Ewing, having consented to the entry of this order; and no reason appearing to the contrary:

[fol. 50] It is, on this fifth day of October, 1943, ordered that the writ of certiorari in the above entitled matter be and hereby is amended by striking out the names of the Respondents, Julia Hoy, Anna Kendall, Anna Kopezynski, Mary Harter, James F. Hughes and August F. Jacobs, and substituting in place thereof their correct names as follows: Grace Hoy, Grace Kendall, Josephine Kopezynski, Helen Harter, James T. Hughes and August Jacob, respectively. Let this rule be entered.

Charles W. Parker, Justice of the New Jersey Supreme Court.

Entered on Motion of: (Signed) Powell & Parker, Powell & Parker, Attorneys for Prosecutor.

I hereby consent to the entry of the within order amending writ of certiorari.

(Signed) William Abbotts, William Abbotts, Attorney for the Respondent, Board of Education of the Township of Ewing.

[fol. 51] IN SUPREME COURT OF NEW JERSEY, OCTOBER TERM, 1943

No. 233

ARCH R. EVERSON, Prosecutor,

vs.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, et al., Respondents

On Certiorari. Before Justices Parker, Heher and Perskie. Submited October 5, 1943. Decided September 13, 1944

Resolution of township board of education, appropriating money, part of school fund, for transportation of pupils to and from schools in a neighboring city other than public schools, held unconstitutional and invalid.

For the prosecutor, Harold T. Parker (Joseph Beck Tyler, amicus curiae).

For the respondents, John Solan and William Abbotts.

OPINION OF JUSTICES PARKER AND PERSKIE—Filed September 13, 1944

The opinion of the Court was delivered by

PARKER, J.:

The question raised by this writ, and submitted on briefs without oral argument, is as to the legal validity of a resolution adopted by the Board of Education of the Township of Ewing, adjoining the City of Trenton, relating to the transportation to Trenton and return, of school children. It appears that the public school facilities in the township [fol. 52] do not extend beyond the eighth grade, and that pupils past that grade have customarily attended public schools in Trenton or Pennington, the township paying for the tuition, and also the cost of transportation advanced by parents or other relatives. Previous to July 1, 1941, all children so transported attended public high schools, and the township Board contracted for their transportation pursuant to R. S. 18:14-8, the first paragraph of which provided that "whenever in any district there are children living remote from the schoolhouse, the board of education of the district may make rules and contracts for the trans-

portation of such children to and from school." The original act seems to date from 1903; (acts of second special session, p. 45). But in 1941 (P. L. p. 581) the paragraph above quoted was amended and another paragraph added. In the first paragraph the words "the schoolhouse" are changed to read "any schoolhouse" and after the words "to and from school" the paragraph continues "including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part." The additional paragraph reads: "When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part."

The result, of course, is to provide for free transportation of children at the expense of the home municipality and of [fol. 53] the State school fund to and from any school, other than a public school, which is not operated for profit; and accordingly, the resolution brought up by this writ provides for the transportation of school children of Ewing township, not only to the Trenton and Pennington High Schools, but to certain other designated schools in Trenton not operated for profit, but not connected with the public school system, "by way of public carriers as in recent years." It is stipulated that the township authorities pursuant to the resolution agreed to pay for the then current school year the cost of transportation to such non-public schools approximately $859.80 and actually did pay part thereof.

We conclude that the resolution under review must be set aside, on the fundamental ground that the amendment of 1941 is in violation of paragraph 6 of Section 7 of Article IV of the Constitution, which reads: "The fund for the support of free schools, and all money, stock and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public free schools,

for the equal benefit of all the people of the state; and it shall not be competent for the legislature to borrow, appropriate or use the said fund, or any part thereof, for any other purpose, under any pretense whatever. * * *"

The facts are not in dispute. We are called upon to decide the purely legal question whether or not the township board of education in appropriating money for transporta-
[fol. 54] tion of pupils to and from parochial schools in a neighboring city, *i. e.*, other than public schools, contravened paragraph 6 quoted above.

There are two theories. A majority of the State courts have held such transportation unconstitutional. The leading case, suporting that theory, is the New York case of *Judd* v. *Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576, 118 A. L. R. 789. Typically illustrative of this theory are the following cases: *State ex rel. Traub* v. *Brown* (Delaware) 36 Del. 181, 172 A. 835; *Sherrard* v. *Jefferson County Board of Education* (Kentucky), 294 Ky. 469, 171 S. W. (2d) 968; *Gurney* v. *Ferguson* (Oklahoma), 190 Okl. 254, 122 P. (2d) 1002; *Mitchell* v. *Consolidated School District No. 201* (Washington), 135 P. (2d) 79 and *State ex rel. Van Straten* v. *Milquet* (Wisconsin), 180 Wis. 109, 192 N. W. 392.

The other theory (Child Benefit Theory) that such transportation is not unconstitutional was adopted by the court of Maryland (*Board of Education of Baltimore County* v. *Wheat*, 174 Md. 314, 199A. 628); by Louisiana (*Borden* v. *Louisiana State Board of Education*, 168 La. 1005, 123 So. 665, 67 A. L. R. 1183 and *Cochran* v. *Louisiana State Board of Education*, 168 La. 1030, 123 So. 664); and by Mississippi (*Chance* v. *Mississippi*, 206 So. 706).

We are not required to make a choice between these two theories, as the matter is not one of first impression in this State. In the case of *Rutgers College* v. *Morgan*, 70 N. J. Law, 460, at pages 474-475, it was held by this court, in an opinion by Justice Van Syckel, that the constitutional provision (paragraph 20 of Article I) and the provision relating to special laws "does not bar instrumentalities for pub-
[fol. 55] lic education provided by the state and under its control by general laws where the appropriation is made for such schools. They were designed as an insurmountable barrier to giving free state aid, and to donations to private or *sectarian* schools, and should be rigidly enforced; but they were not intended to narrow or circumscribe the legislative

power to furnish facilities by general laws for public education under its own supervision." The decision was affirmed by the Court of Errors and Appeals in all essential features in 71 Id. 663. The same principle was applied by Vice-Chancellor Buchanan *in re Voorhees*, 123 N. J. Eq. 142, 196 A. 365, affirmed by this court, 121 N. J. L. 594, 3 A. 2d 891, and by the Court of Errors and Appeals, 124 N. J. L. 35, 10 A. 2d. 650.

The resolution under review will be set aside, with costs.

[fol. 56] In Supreme Court of New Jersey, October Term, 1943

No. 233

Arch R. Everson, Prosecutor,

vs.

The Board of Education of the Township of Ewing, in the County of Mercer, et al., Defendants

Dissenting Opinion of Justice Heher—Filed September 13, 1944

Heher, J. (Dissenting):

I dissent, and vote to dismiss the writ of certiorari.

The statute provides for the transportation of children attending schools other than public schools, not operated for profit, on routes established for the conveyance of public school children. Pamph. L. 1941, p. 581; N. J. S. A. 18:14-8.

It is assailed, first as in contravention of paragraphs 19 and 20 of Article I of the State Constitution. Paragraph 19 provides that "No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation;" and paragraph 20 directs that "No donation of land or appropriation of money shall be made by the state or any municipal corporation to or for the use of any society, association or corporation whatever."

[fol. 57] Paragraph 19 is not in terms applicable to school districts. And I cannot accept the view that the mere transportation of pupils to private schools, over a route already

established for the conveyance of public school children, constitutes a gift, donation, or appropriation of money by the State or a municipal corporation "for the use" of a "society, association or corporation."

Of course, a gift of public funds or property to a private society, association, or corporation would be unconstitutional whether made directly or indirectly. *Wilentz* v. *Hendrickson*, 133 N. J. Eq. 447, affirmed 135 N. J. Eq. 244. But this is not the case here. Such transportation is a service to the children and their parents rather than to the schools, for otherwise the parents would be obliged to provide the conveyance or incur the traffic hazards incident to the journey, for which children are generally so ill-equipped It is in no real sense a contribution to "the use" or the maintenance of the institutions which the children attend. Here, the school district did not operate the transport. The challenged resolution provides for conveyance "by way of public carriers;" and the parents were reimbursed directly for the fares thus expended. And such provision is in the exercise of what I deem to be an unquestionable public function.

School attendance is compulsory. *R. S. 18:14-14, et seq.* Compulsory education is a prerogative of the state. The state may compel parents to perform the natural duty of education owed to their children, and aid them in so doing, except as restrained by constitutional limitations. But compulsory attendance at a public school, whether the compulsion be direct or indirect, would violate constitutional guaranties. *Pierce* v. *Society of Sisters of the Holy Names* [fol. 58] *of Jesus and Mary*, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070. The statute under review facilitates the attendance at both clasess of schools of children remotely situated, and thus contributes substantially to the effectuation of the statutory provisions for compulsory education, and at the same time considers the factor of safety—a reasonable measure to those ends. I am unable to perceive any intrusion upon these or any other constitutional limitations by the mere provision, under such conditions, of transportation to children attending non-public schools not operated for profit. The State recognizes the private school, as perforce it must, as a means of providing the minimum of education decreed by what is conceived to be sound public policy; and I think the Legislature possesses the incidental right of providing transportation to such schools of children resid-

ing at a distance, especially where it is confined to routes found necessary for the conveyance of public school children. I cannot find in any of our constitutional prohibitions a purpose to deny such transportation to children of non-profit private schools, seeking the education which satisfies the standard of the compulsory education law. If this transportation provision be viewed apart from the institutions themselves, and considered as an aid to parents in making educational facilities of their choice available to their children with a measure of safety, in the service of an essential public interest, it seems to me that constitutional doubts lose their force. As so viewed, the act is in aid of compulsory education, a primary concern of society. Education is a matter of "supreme importance, which should be diligently promoted." *Meyer* v. *Nebraska*, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042.

[fol. 59] A like statute has recently received the approval of the Court of Appeals of Maryland. *Board of Education of Baltimore County* v. *Wheat*, 174 Md. 314, 199 Atl. 628. It was there held that "the accommodation of private school children is an incidental use of provision made for an unquestioned public purpose," and therefore the statute did not infringe the prohibition of the Declaration of Rights "against the use of funds for private purposes." Chief Judge Bond declared that whether such use is "private * * * appears to be, finally, a question whether it is in furtherance of a public function in seeing that all children attend some school, and in doing so have protection from traffic hazards." He continued: "Starting with the interest which the State is acknowledged to have in seeing that all children of school age acquire an education by attending some school, and the fact that they are complying with the law in going to such a school as the parochial school involved in this case, their accommodation in the buses appears to the court to be within the proper limits of enforcement of the duty imposed. Compliance having been made dangerous in a much greater degree, removal of the danger to any extent would seem to be within the same public function. * * * This conclusion that the act must be regarded as one within the function of enforcing attendance at school, renders it unnecessary to consider separately the objection that a religious institution is aided. Art. 36, Declaration Rights. The institution

must be considered as aided only incidentally, the aid only a by-product of proper legislative action."

There is a conflict in the cases elsewhere that is in some [fol. 60] instances more seeming than real. For example, in the case of *Judd* v. *Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576, cited in the majority opinion, the constitution contained a sweeping provision against the use, "directly or indirectly," by the State or any subdivision thereof, of public money "in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious, or in which any denominational tenet or doctrine is taught." The majority classified the statute as bestowing an indirect benefit upon the institutions as such, on the theory that "Free transportation of pupils induces attendance at the school," and "The purpose of transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it." Chief Judge Crane, for the minority, considered the measure to be a proper complement to the compulsory education statute. He said: "The object of such legislation is apparently to insure the attendance of the children at their respective schools for the requisite period of instruction and, perhaps, to safeguard the health of the children. The statute is not designed to aid or maintain the institutions themselves. Recognizing the right of the children to be sent to such schools, and enjoining upon them the duty of regular attendance, the Legislature gave the authorities power, in a proper case, to assist the children in getting to their school. * * * There is no benefit to the schools except, perhaps, as one may conceive an accidental benefit in the sense that some parents might place their children in religious schools when they anticipate transportation provision, though they might hesitate to do so if the children were compelled [fol. 61] to make their own way. The constitutional provision is not designed to discourage or thwart the school where religious instruction is imparted. 'Denominational religion is merely put in its proper place outside of public aid or support.'"

The doctrine that provision of transportation aids the private non-profit school by inducing attendance of pupils was rejected, as unfounded in fact, by Mr. Justice Robinson and Mr. Justice Mallery in interesting and well rea-

soned dissents in the case of *Mitchell* v. *Consolidated School District No. 201*, 135 Pac. (2d) 79. It would seem that the statutory provision for the transportation of public school pupils was primarily designed to make such educational facilities available to pupils remotely situated from the seat of instruction, and thus to aid in the performance of the public educational function.

These considerations also dispose of the contention that the statute runs counter to paragraphs 3 and 4 of Article I of the State Constitution.

And I cannot agree that the Act violates Article IV, section 7, paragraph 6, of the Constitution, safeguarding the "fund for the support of free schools."

The attack is upon the statute itself, not the use of public moneys as in contravention of this constitutional provision. The sole point made is that the act infringes the several cited constitutional limitations; and it is said *arguendo*, that "part of the moneys used by school districts for transportation of pupils to private or sectarian schools can be traced to the school districts directly from the State school fund mentioned in the Constitution." There is no proof whatever that any part of the State school fund was so [fol. 62] used here. The holding of the case of *Rutgers College* v. *Morgan*, 70 N. J. L. 460, affirmed 71 N. J. L. 663, is that this constitutional mandate has relation only to what may be done with the constituted school fund, not what may be done with the general funds of the State. The sole question raised here is the constitutional sufficiency of the statute.

IN SUPREME COURT OF NEW JERSEY

ARCH R. EVERSON, Prosecutor,

vs.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, et al., Respondents

On Certiorari

RULE SETTING ASIDE RESOLUTION OF THE RESPONDENT BOARD OF EDUCATION—Filed September 14, 1944

The Court, having inspected the depositions and the transcript and proceedings of the respondent Board of

Education, returned with the writ of certiorari in this cause and the reasons for setting aside the resolution adopted by the respondent Board of Education on September 21, 1942, and having duly considered the argument of counsel herein, it is on this 14th day of September, 1944;

Ordered that the aforesaid resolution of the respondent [fol. 63] Board of Education be set aside, vacated and made for nothing holden, with costs to be taxed.

Entered September 14, 1944, on Motion of: (Signed) Powell & Parker, Attorneys for Prosecutor.

IN SUPREME COURT OF NEW JERSEY

[Title omitted]

NOTICE OF APPEAL—Filed November 29, 1944

To Powell & Parker, Esquires, Attorneys for Arch R. Everson, Prosecutor.

SIRS:

Please take notice that the Board of Education of the [fol. 64] Township of Ewing, in the County of Mercer, Florence S. Higgs, Grace Hoy, Grace Kendall, Josephine Kopezynski, Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul N. Barr, Helen Harter, James T. Hughes, Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August Jacob, James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan, and William Ryan, respondents in the above-stated proceeding, appeal from the whole of the judgment entered in this cause, to the Court of Errors and Appeals in the last resort in all causes in New Jersey.

Respectfully yours, William Abbotts, Attorney for Respondents.

William H. Speer, of Counsel.

Dated: November 18, 1944.

Sat below: Parker, J.; Perskie, J.; Heher, J.

Service of the within Notice of Appeal is acknowledged this 18th day of November, 1944.

Powell & Parker, Attorneys for Arch R. Everson, Prosecutor.

[fol. 65] In New Jersey Court of Errors and Appeals

Board of Education of the Township of Ewing in the County of Mercer, Florence S. Higgs, Grace Hoy, Grace Kendall, Josephine Kopezynski, Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul N. Barr, Helen Harter, James T. Hughes, Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August Jacob, James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan, Respondents-Appellants,

vs.

Arch R. Everson, Prosecutor-Appellee

On Appeal from the New Jersey Supreme Court

Grounds of Appeal—Filed November 29, 1944

To Powell & Parker, Esquires, Attorneys for Arch R. Everson, Prosecutor-Appellee.

Sirs:

Please take notice that the Respondents-Appellants assign the following grounds of appeal from the judgment of the New Jersey Supreme Court in the above-entitled cause: [fol. 66] The Supreme Court erred in giving judgment for Prosecutor-Appellee instead of for the Respondents-Appellants.

Respectfully yours, William Abbotts, Attorney for Respondents-Appellants.

William H. Speer, of Counsel.

Service of the within Grounds of Appeal is acknowledged this 18th day of November, 1944.

Powell & Parker, Attorneys for Arch R. Everson, Prosecutor-Appellee.

[fol. 67] In New Jersey Court of Errors and Appeals

[Title omitted]

Grounds of Appeal—Filed January 2, 1945

To Powell & Parker, Esquires, Attorneys for Arch R. Everson, Prosecutor-Appellee.

Sirs:

Please take notice that the Respondents-Appellants assign the following grounds of appeal from the judgment of the New Jersey Supreme Court in the above-entitled cause: [fol. 68] The Supreme Court erred in giving judgment for Prosecutor-Appellee instead of for the Respondents-Appellants.

Respectfully yours William Abbotts, Attorney for Respondents-Appellants.

William H. Speer, of Counsel.

Due and legal service of the within Grounds of Appeal is hereby acknowledged as of November 18, 1944.

Powell & Parker, Attorneys for Arch R. Everson, Prosecutor-Appellee.

[fol. 69] In New Jersey Court of Errors and Appeals

[Title omitted]

Order Amending Title of Grounds of Appeal—Filed January 2, 1945

It appearing to the Court that in the Grounds of Appeal served on November 18, 1944, and filed on November 29, 1944, in this Court, in the above-entitled cause, that in the styling of the title the names of the parties were inadvertently reversed, and it appearing that counsel for the prosecutor-appellee have consented to the making, entry, and filing of this order, and it further appearing that Grounds of Appeal amending and curing said situation, by the transposition of the names of the parties to said appeal so as to bring the same into conformity with Rule 20 of this Court, have been served upon the prosecutor-appellee, and due and

[fol. 70] legal service thereof has been acknowledged thereon as of November 18, 1944:

It is hereby ordered that said Grounds of Appeal actually served on November 18, 1944, and filed in the Office of the Clerk of this Court on November 29, 1944, be and the same hereby are amended so as to conform to Rule 20 of this Court, and are to be considered as having been in the form and substance set forth in the Grounds of Appeal acknowledged to have been served on prosecutor-appellee "as of November 18, 1944," and said Grounds of Appeal actually served on November 18, 1944, are to be considered as having been entitled at the date of their service and filing, and thence hitherto, as if said title had always been as set forth in the Grounds of Appeal acknowledged to have been served upon prosecutor-appellee "as of November 18, 1944."

We hereby consent to the making, entry, and filing of the above order.

Powell & Parker, Attorneys for Prosecutor-Appellee.

[fol. 71] In New Jersey Court of Errors and Appeals, May Term, 1945

No. 32

Arch R. Everson, Prosecutor-Respondent,

vs,

Board of Education of the Township of Ewing, in the County of Mercer, et als., Respondents-Appellants

Appeal from the Supreme Court on Certiorari.

Argued May 21, 1945; decided October 15, 1945.

Syllabus

P. L. 1941, Chapter 191 held to be a valid enactment and not in contravention of Article 1, paragraphs 3, 4, 19 and 20, or Article 4, Section 7, paragraph 6 of the Constitution of this State or the Fourteenth Amendment to the Constitution of the United States.

For respondents-appellants, William H. Speer, of counsel; William Abbotts, attorney of record; George G. Tennant and Joseph Lanigan, amici curiae.

For prosecutor-respondent, Albert McCay, of counsel; Powell and Barker, attorneys of record; Joseph Beck Tyler, attorney and of counsel with American Civil Liberties Union, amicus curiae.

OPINION—Filed Oct. 15, 1945

The Opinion of the Court was delivered by the CHANCELLOR:

This is an appeal from a judgment of the Supreme Court, on certiorari setting aside a resolution of the appellant Board of Education enacted under the authority of R. S. 18:14-8 as amended by P. L. 1941, Chapter 191 providing for the transportation of pupils for the school year, July 1, 1942 to June 30, 1943.

Pursuant to such resolution the appellant on February 15, 1943, authorized the payment of $8,034.95 for transportation. Of this sum $357.74 was paid to the parents of twenty-one pupils who were transported to parochial [fol. 72] schools in Trenton, five to elementary schools and sixteen to high schools. The appellant provides no education facilities in its district beyond the eighth grade. The transportation was by public carrier bus. The payments to parents were in satisfaction of advancements made by them; and the amount was fixed upon the basis of the actual number of days' attendance as indicated upon each pupil's report card.

The record before us shows that the reasons advanced in the Supreme Court and here in support of the judgment under review are that the statute, upon which the resolution is based, is infirm and inoperative because it contravenes several constitutional inhibitions, namely; Article I, paragraphs 3, 4, 19 and 20; Article IV, Section 7, paragraph 6, of the Constitution of this State; and, the Fourteenth Amendment to the Constitution of the United States.

None of these several provisions of the Constitution, except that of Article IV, Section 7, paragraph 6, requires any discussion. For neither their language, meaning, intent, nor effect are violated by the statute, supra, or the resolution challenged in this proceeding.

We turn at once to the reason that the statutory enactment is constitutionally defective because it is said that it is in conflict with Article IV, Section 7, paragraph 6.

It appears from the majority opinion of the Supreme Court that it based its conclusion and judgment "on the foundamental ground that the amendment of 1941 is in violation of paragraph 6 of Section 7 of Article IV of the Constitution" citing as authority Rutgers College vs. Morgan, 70 N. J. L. 460 affd. 71 N. J. L. 663 and In re Voorhees, 123 N. J. Eq. 142 affd. 121 N. J. L. 594 (Supreme Court) affd. here, 124 N. J. L. 35. We find in the minority opinion the statement "There is no proof whatever that any part of the State School Fund was so used here." A meticulous examination of the record shows an absolute lack of any such proof.

The duty of this court in such a situation is well established. It is settled that findings of fact by the Supreme Court on conflicting evidence or on uncontroverted evidence reasonably susceptible of different inferences are conclusive on appeal, Jersey City vs. State Water Policy Commission, 118 N. J. L. 72, 77; Siravo vs. Sirian Lamp Co., 124 N. J. L. 433. It is also settled that we do not hesitate [fol. 73] to reverse where there is no competent evidence to support a fact conclusion arrived at below, Ciocca vs. National Sugar Refining Co., 124 N. J. L. 329, 335; Cirillo vs. United Engineers, etc., 121 Id. 511, 512; Grant vs. Metropolitan Ice Co., 108 Id. 536, 537 and further that this Court will reverse any material fact conclusion if it rests on erroneous premises. Bollinger vs. Wagaraw Building Supply Co., 122 N. J. L. 512, 517; Ciocca vs. National Sugar Refining Co., supra, 335; Rotino vs. J. P. Scanlon, Inc., 126 Id. 419, 421.

As said, the record before us is barren of any evidence as to the source of the funds from which the challenged payment of $357.74 was made.

In this state of proof we must assume that the payment was made lawfully, from funds under appellant's control. We may not assume, in the absence of proof, that the moneys were taken from the appellant Board's distributive share of the income of the State School Fund, R. S. 18:10-1 to 17.

The history of the State School Fund—"The Fund for the support of free schools"—may be traced from its origin in P. L. 1817, pam. 26 as amended by P. L. 1818, pam. 100 and succeeding statutory amendments and supplements. Pennington's Revision (1821) p. 612, 649, 660; Nixons Digest (4th Ed. 1868) p. 877, sec. 65-75; Revision (1877)

p. 1081, sec. 65-76 and p. 1087, sec. 101, 102; 3 Gen. Stat. 3030, sec. 65-76; 4 Comp. Stat. 4778, sec. 166-176; R. S. 18:10-1 to 17. Therein is perceived the basis and reason for the constitutional provision relied on by the Supreme Court which was originally inserted in the basic law in 1844.

This constitutional provision of 1844 stripped the legislature of the power it had reserved to itself in P. L. 1318, pam. 100, to change, alter or dissolve this trust fund. The capital of the fund and the income therefrom were protected against trespass by the legislature. State vs. Rutherford, 98 N. J. L. 465, 467. The constitutional provision together with other statutes identifies the fund therein referred to.

The amendment of this paragraph of the Constitution in 1875 had an entirely different purpose than the provision just discussed. The amendment of 1875 was a mandate to the legislature to broaden the field of free public school education and pursuant to this mandate legislation was enacted to pay the cost of such education by providing for the raising of a state school tax, delegating taxing powers to local school districts to raise funds for local [fol. 74] school purposes and dedicating certain railroad taxes and other state funds for the same purpose. These were all statutory provisions and were subject to alteration, modification, and repeal by subsequent legislation untrammeled by the constitutional inhibition applicable to the fund for the support of free schools. The legislature already had the necessary power and the amendment of 1875 neither increased nor limited it in any particular.

Nothing appears on the face of the resolution or the challenged statute that could be construed to authorize the use by the appellant of any of its apportioned share of the fund for the support of free schools, R. S. 18:10-1 to 17, to pay the cost of transportation of pupils to parochial schools.

We are asked to imply that the statute and resolution authorize the use of constitutionally proscribed funds for such purpose.

This we may not do. The rule is that courts will presume in favor of the constitutionality of a statute and will incline to a construction favoring its validity unless its invalidity plainly appears. State vs. Tachin, 92 N. J. L. 269, 274 affd. 93 Id. 485; State Board of Milk Control vs. New-

ark, 118 N. J. Eq. 504, 519; State vs. Murzda, 116 N. J. L. 219, p. 223.

We are likewise urged to construe R. S. 18:10-41 as indicating an unconstitutional use of money by the appellant. This section requires the county superintendent of schools to apportion the State School moneys allotted to the county to the respective school districts for certain purposes designated therein.

Let it be noted here that all funds included in the phrase "state school moneys" are not within the constitutional inhibition relied on by the respondent. The section, however, requires the County Superintendent to apportion out of State School moneys "Seventy-five per cent of the cost of transportation of pupils to *public school or schools* * * *."

The language is clear and unambiguous.

In the case before us the total transportation cost was $8,034.95 for a half year which included $357.74 as the cost of transporting parochial school pupils and in the absence of proof to the contrary we must assume that the County Superintendent obeyed the statute and based the allotment on the cost of transporting the pupils to the public school or schools.

[fol. 75] School districts, such as the appellant, are authorized by R. S. 18:7-78 to raise by special district taxes funds to defray certain current charges and expenses of the public schools in their districts including "transportation of pupils * * *" and "the incidental expenses of the schools."

Funds so raised are not prescribed or limited in their use by Article IV, Section 7, paragraph 6 of the Constitution.

The intent of P. L. 1941, Chapter 191 is that pupils may be transported to parochial schools only as an incident to the transportation of pupils to the public schools since the statute provides that children attending schools could be furnished transportation by any school district from any point *on an already established school route* to any other point *on such established school route*. Payment of such expense out of local taxes is the payment of "incidental expenses" or "transportation of pupils" authorized by R. S. 18:7-78.

Since we hold that the legislature may appropriate general state funds or authorize the use of local funds for

the transportation of pupils to any school, we conclude that such authorization of the use of local funds is likewise authorized by P. L. 1941, Chapter 191, and R. S. 18:7-78. The legislature clearly intended once the transportation of such pupils was contracted for, that it should be paid out of funds constitutionally available for the purpose.

It is next urged the R. S. 18:14-8 as amended by P. L. 1941, Chapter 191, is violative of *Article I*, paragraphs 19 and 20 because the payment of transportation costs of pupils attending schools is the giving of direct or indirect aid to sectarian schools or amounts to a gift to an individual.

Compulsory education has long been a requirement in this State. P. L. 1874, Chapter 522; p. 135; P. L. 1875, Chapter 443, p. 105; P. L. 1885, Chapter 217, p. 280; 3 Gen. Stat. p. 3061, Sec. 255; 4 Comp. Stat. p. 4775, Sec. 153, et seq.; R. S. 18:14-14 as amended P. L. 1940, Chapter 153, p. 346; R. S. 18:14-34, 39, 40.

It is a matter of public concern and legislative regulation and should be enforced as long as the requirements are reasonable. Of course this is subject to constitutional limitations, Pierce vs. Society of Sisters, etc. 268 U. S. [fols. 76-77] 510; 45 S. Ct. 571, 69 L. ed. 1070.

It is a public matter within the legislature prerogative concerning which the legislature may act and has, by the statutes including that here considered.

The Compulsory education statutes impose on the *parents*, not the children, an absolute duty subject to three exceptions, physical or mental disability of the child or adequate provision by private teaching other than in a recognized day school. The statute is penal in nature for a violation of which parents may be convicted as disorderly persons, R. S. 18: 14-34, 39, 40.

Many situations could arise, where, without regular means of transportation, parents would be placed in a situation which made it practically impossible to comply with the compulsory education requirements and therefore without wilful intent to evade or transgress, would become subject to the penalties established for failure to perform the duty imposed.

It was to meet this mischief that the original statute authorizing the transportation of pupils living remote from the schools was enacted. The statutes looking to trans-

portation became complementary to and in aid of the compulsory education statutes.

It is a public matter and moneys expended therefor, except those prohibited by the Constitution of this State, do not constitute the expenditure of public moneys for private purposes.

We conclude that there is nothing on the face of the resolution or statute or in the record before us showing that either the statute or the resolution enacted thereunder is unconstitutional or does violence to the Constitution for any of the reasons urged.

The judgment of the Supreme Court is reversed and the cause remanded to the end that the writ of certiorari be dismissed.

[File endorsement omitted.]

[fol. 78] In New Jersey Court of Errors and Appeals, May Term, 1945

No. 32

Arch R. Everson, Prosecutor-Respondent

vs.

Board of Education of the Township of Ewing, in the County of Mercer, et als., Respondents-Appellants

Dissenting Opinion—Filed October 15, 1945

Case, J. (Dissenting):

The issue is the constitutionality of reimbursement by the Board of Education of the Township of Ewing, from public moneys, to parents, resident in the township, for the bus fares paid by their children on public buses between the township and the City of Trenton, in which city the children attended certain Roman Catholic parochial schools. The religion of the church was taught in each of the schools as a part of the curriculum. A priest of the church was the superintendent of the schools. The resolution under review made no provision for transportation to private or sectarian schools other than Catholic schools and therefore did not make provision for children generally.

Further, it made no change in the method of transportation and so added nothing to protection against traffic hazards. The transportation had been and continued to be by public buses running on their usual schedules. The township public schools extend through the eighth grade. Public school children beyond those elementary grades are transported either to Trenton or Pennington. Some of the parochial school children transported to Trenton were in the elementary grades and some in the high school grades. Consequently the parochial school children in the elementary grades were transported to the City of Trenton although the public school children in those grades were received and taught in the schools within the school district. It must be assumed that these various arrangements were within the purview of the statute; else the resolution of the Board of Education was itself without statutory authority and therefore void. The resolution was as follows:—

> [fol. 79] "The Transportation Commtt. recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic Schools, by way of public carriers as in recent years. On Motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted."

The resolution is rested upon the second paragraph of R. S. 18:14-8 as amended by ch. 191, P. L. 1941:—

> "18:14-8. Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.
>
> When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.

A major question is whether the furnishing of transportation to private or parochial schools out of public money is in aid or support of such schools and whether constitutional provisions which prohibit such aid or support are violated by statutory authority for transportation. The argument that such disbursements are not in aid of the schools is based upon what is known as the "child-benefit" theory which presents as a distinction that the charges are for the benefit of the children rather than of the schools. That theory seems to have first been given judicial sanction in the State of Louisiana where the courts sustained a statute which permitted the use of public funds to purchase school books for distribution, free of cost, apparently as a loan, to "the school children of the state", a classification which by its broad terms included children in attendance at private and parochial schools. *Borden vs. Louisiana State Board of Education,* 168 La. 1005, 67 A. L. R. 1183, *Cochran vs. Louisiana State Board of Education,* 168 La. 1030. The latter case went to the United States Supreme Court (281 U. S. 370, 74 L. Ed. 913) where it was held that the legislation was not in violation of the 14th amendment to the United States constitution. Chief Justice Hughes, holding the opinion for the court (April 28, 1930), after quoting at length from the opinion of the Louisiana Supreme Court to the effect that the appropriations were "for [fol. 80] their (viz., the children's) benefit and the resulting benefit to the state", said (italics inserted):—

> "*Viewing the statute as having the effect thus attributed to it,* we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation *does not segregate private schools or their pupils,* as its beneficiaries * * *."

I am unable to find more in the federal decision than that, first, the Supreme Court accepted the finding of the state court upon the purpose and effect of the state statute and, second, that the statute, given the purpose and effect thus attributed to it, with the added incident that it did not segregate its beneficiaries, was not in violation of the 14th amendment. That the Supreme Court accepts the construction by a state court of a state statute in such a case is manifested by the fact that some years later it twice (317 U. S. 588, 63 Sup. Ct. 34, 87 Law. Ed. 481; 317 U. S. 707, 63 Sup. Ct. 153, 87 Law. Ed. 564) refused *certiorari* to re-

view the decision of the Oklahoma Supreme Court coming to an opposite conclusion regarding "child-benefit" in *Gurney vs. Ferguson, infra.*

The "child-benefit" theory seems to have received judicial support in only three jurisdictions, Louisiana (already discussed), Mississippi (*Chance vs. Mississipi State Textbook R. & P. Board,* 200 Southern 706), which followed the Louisiana reasoning in the construction of a statute of like import, and Maryland; and the last mentioned is the only jurisdiction, so far as appears, where the paying from public funds of transportation costs for children in private or sectarian schools has been judicially approved. In both Louisiana and Mississippi the subject matter was the free distribution of certain textbooks, and the provision was for the benefit of the children of the state, generally. In the State of Maryland it was held that a statute providing for transportation of children to private or parochial schools in the regular public school buses was constitutional, *Board of Education of Baltimore County vs. Wheat*—May 20, 1938—199 Atl. 628, and, several years later, that contributions from public money to the parochial schools for transportation in their own buses was likewise constitutional, *Adams vs. County Commissioners of St. Mary's County*—May 26, 1942—26 Atl. 2d 377. The trend from the one to the other of these two cases toward enlargement of the powers is to be observed.

[fol. 81] The "child-benefit" argument is made here. Among its weaknesses, as a means of avoiding constitutional inhibitions, are its vagueness and the impossibility of satisfactorily distinguishing one item of expense from another in the long process of child education. Counsel for the appellants herein say of the theory that its

> "denomination, because of its generality, may be misleading, and we call it so here purely for identificatory purposes. It connotes so much more than merely the benefit to the child and has been so often and so authoritatively held so to do, that we deem it proper to mention the fact here, i.e., it connotes a huge and perhaps principal benefit to the State, in contributing to the advancement of education, the promotion of literacy, the health and safety of its citizens, that it

seems too narrow and insufficient to confine it in such a verbal straight jacket."

That observation made in support of the disbursements nevertheless emphasizes the almost limitless extent of the "child-benefit" theory. We quickly perceive that it applies not merely to transportation costs but to the potential costs of the many and varied items entering into modern education. There is no logical stopping point. Related items, already in the public school system, in addition to the vast field having to do with the actual imparting of knowledge, are the installation and maintenance of cafeterias, the preservation and promotion of the health of pupils, the employment of medical inspectors and nurses, the keeping of records of development and growth, and the supervision of athletic activities and bodily exercise. I am unable to distinguish between the logic of using public funds for one as against another of the several parts of the system pursued by the public schools toward "the advancement of education, the promotion of literacy and the health and safety" of the pupils. Every step in the educational process is, presumably, for the benefit of the child and, therefore, theoretically, for the benefit of the state. Consequently, if the argument is sound, it is within the discretion of the legislature, free of constitutional restraint, to provide for practically the entire cost of education in private and parochial as well as in public schools.

On the contrary, the courts of at least six states have held that the private or parochial schools attended by the children are beneficiaries of such legislation and that the [fol. 82] legislation violates constitutional provisions which prohibit benefactions of that character. *State ex rel. Traub* vs. *Brown* (1934), 6 W. W. Harr. 32, 36 Del. 181, 172 Atl. 835 (writ of error dismissed 39 Del. 187, 197 Atl. 478); *Gurney* vs. *Ferguson* (1941), 190 Okla. 254, 122 Pac. 2d 1002; *Judd* vs. *Board of Education* (1938), 278 N. Y. 200, 15 N. E. 2d 576; *Mitchell* vs. *Consolidated School District* (Wash. 1943), 135 Pac. 2d 79; *Williams* vs. *Board of Trustees* (1917), 173 Ky. 708, 191 S. W. 507, L. R. A. 1917D 453; *Sherrard* vs. *Jefferson County Board of Education* (1943), 294 Ky. 469, 171 S. W. 2d 963; *Von Straten* vs. *Milquet* (1923), 180 Wisc. 109, 192 N. W. 392. The following

excerpts will indicate how positively those courts have expressed themselves:

From *Judd* vs. *Board* (New York Court of Appeals):

> "The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils. That argument is utterly without substance. * * * Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. * * * It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid. * * * The courts of this country have been unanimous in prohibiting a use of public funds to pay, directly or indirectly, tuition fees of pupils in private or sectarian schools (citing cases) in spite of the argument presented that tuition fees were for the benefit of pupils exclusively and not for the schools."

From *State ex rel. Traub* vs. *Brown* (Delaware Superior Court):

> "We are of the opinion that to furnish free transportation to pupils attending sectarian schools, is to aid the schools. It helps build up, strengthen and make successful the schools as organizations. The relators cite in opposition to the above cases, the case of Borden vs. Louisiana State Board of Education, 168 La. 1005, 123 So. 655, 67 A. L. R. 1183. We are not impressed by the reasoning of this case."

From *Gurney* vs. *Ferguson* (Oklahoma Supreme Court):

> "It is argued that the present legislative act (providing for transportation of pupils attending public schools) does not result in the use of public funds for the benefit or support of this sectarian institution or school 'as such'; that such benefit as flows from these acts accrues to the benefit of the individual child or to

[fol. 83] a group of children as distinguished from the school as an organization. That argument is not impressive. * * * It is true this use of public money and property aids the child, but it is no less true that practically every proper expenditure for school purposes aids the child."

From *Mitchell* vs. *Consolidated School District* (State of Washington Supreme Court):

"We think the conclusion is inescapable that free transportation of pupils serves to aid and build up the school itself. That pupils and parents may also derive benefit from it, is beside the question."

In *Sherrard* vs. *Jefferson County Board* the Kentucky Court of Appeals dealt with the question of transportation costs, rejected the "child-benefit" theory, approved the reasoning in *Gurney* vs. *Ferguson, supra,* and gave favorable citation of *State ex rel. Traub* vs. *Brown* and other decisions mentioned above. The A. L. R. annotator, by way of a resume of the law held in the cases reported and annotated in 63 A. L. R. 413, 118 A. L. R. 806 and 141 A. L. R. 1152, makes (Vol. 141, p. 1152) this well-supported observation:

"It seems to have been held, in most cases, that the transportation of pupils to a sectarian school amounts to the appropriation of moneys in aid of the school and is therefore unconstitutional."

It is the consensus of the weight of judicial opinion that the "child-benefit" theory is an ingenious effort to escape constitutional limitations rather than a sound construction of their content and purpose. I conclude that the furnishing of transportation to private or parochial schools out of public money is in aid or support of such schools and is in violation of constitutional provisions which prohibit such aid or support. On the assumption that that is the correct answer to the posed question I proceed to consider our constitutional provisions:

Article 4, sec. 7, para. 6 of our state constitution provides:

"The fund for the support of free schools, and all money, stock and other property, which may hereafter

be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public free schools, for the equal benefit of all the people of the [fol. 84] state; and it shall not be competent for the legislature to borrow, appropriate or use the said fund or any part thereof, for any other purpose, under any pretense whatever. The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years."

There can be no doubt that the paragraph was violated if proceeds from the school fund were involved. The majority opinion takes the stand that the record before us is barren of any evidence as to the source of the funds from which the challenged payment was made, and so assumes that the disbursement was from other moneys. I suggest that while there is not specific proof that the payment contained any part of the school fund proceeds, nevertheless there is evidence from which an inference of such a fact may legitimately be drawn and that, such being the case, the thoroughly established jurisdiction of the Supreme Court to find facts, on *certiorari*, which are binding upon us should control here. There was not the slightest suggestion in the proofs that the disbursed money was specially raised, or that it came from a particular source, or that there had been a segregation of the proceeds of the school fund from the other school moneys in the hands of the township board. It is a fair inference, as I read the testimony, that the school moneys, from whatever source, were mingled and that the litigated disbursements were made from the mingled moneys. Counsel for respondents under the writ, appellants here, brought out by examination of the clerk of the board that the school law provided for payment of transportation costs and that the board, on February 15, 1943, directed the payment of "a transportation bill" for the first half of the school year—the second half-yearly payment was withheld because of this litigation—in the amount of

$8,034.95, and that included therein was the transportation of pupils to the Trenton High Schools, both junior and senior, and to the Trenton parochial schools. The machinery by which the proceeds of the state school fund and of the state school tax reaches the several school boards is as follows: The commissioner of education equitably apportions to the several counties the amount appropriated from the state school fund (R. S. 18: 10-17) and the state comptroller thereupon draws (italics inserted) "his *warrant* on the state treasurer in favor of the county treasurer of each county [fol. 85] for the portion of the income of the state school fund *and* of the state school tax to which the county is entitled" (R. S. 18: 10-27) and the respective county treasurer pays the same to the custodian of the school moneys in the several school districts on the orders of the superintendent of schools of the county (R. S. 18: 10-28); and the county superintendent is directed to apportion to the several school districts the state school moneys and the interest of the surplus revenue for various named purposes, among which is the meeting of seventy-five per centum of the cost of transportation of pupils (R. S. 18: 10-41). I consider that with this statutory mingling of moneys devoted to school purposes and with the proof that the local board directed the payment of "a transportation bill"—the mental picture is of a consolidated figure disposed of as one item—of $8,034.94 for a half year's transportation of both public school and parochial school pupils the Supreme Court had sufficient upon which to support a finding that the amount was paid from mingled moneys, of which the proceeds from the state school fund were a part. That finding is implicit in the Supreme Court decision. I accept it as supported by the record and therefore as binding upon us. It follows that the designated constitutional provision was violated. But the violation was not of that provision only.

Article 1, para. 19 provides:

> "No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become security for, or be directly or indirectly the owner of, any stock or bonds of any association or corporation."

Article 1, para. 20 provides:

> "No donation of land or appropriation of money shall be made by the state or any municipal corporation to or for the use of any society, association or corporation whatever."

Article 4, sec. 7, para. 11, provides:

> "The legislature shall not pass private, local or special laws in any of the following enumerated cases, that is to say: * * * Providing for the management and support of free public schools."

The conclusion, already reached, that the appropriation is in aid or support of the schools brings both the board resolution and the statute in conflict with para. 20. Our Supreme Court, our Chancery Court and our Court of Errors and [fol. 86] Appeals have either expressed or adopted a view that necessarily leads to that result. In *Rutgers Colleve vs. Morgan, Comptroller*, 70 N. J. L. 460, 474, Justice Van Syckel for the Supreme Court said of article 1, para. 20, and of the further provision relating to special laws: "They were designed as an insurmountable barrier to giving free state aid, and to donations to private or sectarian schools, and should be rigidly enforced; * * *." The opinion, with emendations that did not touch upon that expression, was adopted by the Court of Errors and Appeals, 71 N. J. L. 663. Justice Van Syckel's language was quoted verbatim by Vice Chancellor Buchanan in deciding *In re Voorhees*, 123 N. J. Eq. 142, with this observation (page 146): "This determination was quite clearly approved by the Court of Errors and Appeals in *Morris and Essex Railroad Co. v. Mayor, &c., of Newark*, 76 N. J. Law 555, 560, 70 Atl. Rep. 194." *In re Voorhees* was affirmed *sub nom. Union County Trust Co. vs. Martin* by the Supreme Court, 121 N. J. L. 594, on the opinion of Vice Chancellor Buchanan and was further affirmed by the Court of Errors and Appeals, 124 N. J. L. 35.

Further, even if acceptance is to be given to appellants' theory that the appropriations are for the benefit of the children, article 1, para. 19 is violated by the resolution under review because that resolution contains no provision for the transportation of children generally. The authorized payment becomes a gift of money in aid of individuals.

There is no provision for the transportation of children attending private or sectarian schools other than Catholic schools. Contrary to the statement of Chief Justice Hughes in *Cochran vs. Louisiana State Board, supra,* the resolution *does* segregate the schools and the pupils designated as beneficiaries. As has already been said, either the authority for this and every other provision of the resolution must be read into the statute or there is no authority for the resolution. Again, since the resolution is special as to those who are thus benefited by it and the arrangement is fitted into and integrated with the public school legislation, I consider that the constitutional prohibition against special legislation with respect to that system is violated, at least in spirit.

There is no compulsion upon parents in this state to send their children to a public school; but the public schools are [fol. 87] open to every child and are attended by children of all religious faiths. The suggestion that, notwithstanding constitutional restraint, transportation may be furnished, at public expense, to such private or sectarian schools in another municipality as a parent or guardian may select, even though there are public school facilities within the district, is not, I think, supported by the statute. It will be recalled that some of the children were transported to parochial elementary classes in Trenton although public schools of those grades were maintained in Ewing Township. The statute (R. S. 18:14-8) is not fairly susceptible of the construction that when a district board, owing to the lack of a local high school, arranges for the transportation of public school pupils to *high schools* in other centers, it may thereupon, likewise at public expense, transport children to the *elementary grades* of parochial schools located in those centers.

I hold district boards of education to be within the inhibitions placed by paragraphs 19 and 20, *supra,* upon municipalities and municipal corporations. *Cf. Landis vs. School District,* 57 N. J. L. 509, *State vs. Deshler,* 25 N. J. L. 177, *Strock vs. East Orange,* 77 N. J. L. 382, *Trustees vs. Civil Service Commission,* 83 N. J. L. 196, 202, aff. 86 N. J. L. 307.

Article 1, para. 3 of our state constitution provides:

> "No person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place

of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately and voluntarily engaged to perform."

The operation of a church school under the direction of, and teaching the tenets of, a church, is a primary function whereby that church puts its impress upon and holds the children of the church to its faith. The parochial schools are a part of the ministration of the church under whose control they are. The ministry of the church is concerned and connected therewith. Specifically, in this instance, a priest of the church is the superintendent. The schools are maintained by the parish and by moneys paid by the parents. They operate at a loss. Inasmuch as the disbursements [fols. 88-89] from public moneys are, according to the view taken above, in aid or support of the schools thus maintained and operated, and there is no dispute over the proposition that tax moneys are a part thereof, I come to the further conclusion that the resolution is in violation of article 1, para. 3, *supra*.

Both the resolution of the board and the statute upon which the resolution is rested are before us for review. In my opinion both are in violation of our constitution and the resolution exceeds the statutory authority.

For the reasons stated I vote to affirm the judgment below.

Justice Colie and Judge Wells authorize me to say that they are in accord with the foregoing views.

[fols. 90-100] In New Jersey Court of Errors and Appeals

Arch R. Everson, Prosecutor-Respondent,

v.

Board of Education of the Township of Ewing, in the County of Mercer, et al., Respondents-Appellants

Rule for Reversal and Remittitur

This cause having been duly argued at the May Term, 1945, and briefs having been submitted, and the Court having examined the records and proceedings below, and

considered the grounds of appeal, and finding that there was error in the said record and proceedings of the Supreme Court:

It is therefore ordered that the judgment of the Supreme Court be in all things reversed, set aside and for nothing holden, and that the record and proceedings be remitted to the Supreme Court to the end that the writ of certiorari be dismissed with costs to the appellants.

Entered this 8th day of November, 1945.

On Motion of William Abbotts, Attorney of Respondents-Appellants.

[fols. 101-102] In New Jersey Court of Errors and Appeals

[Title omitted]

Order Denying Application for Reargument

Application for re-argument is denied.
Decision announced by Court on November 29, 1945.

[fol. 103] In New Jersey Court of Errors and Appeals

[Title omitted]

Petition for Allowance of Appeal From the New Jersey Court of Errors and Appeals to the Supreme Court of the United States—Filed February 5, 1946

To Honorable Luther A. Campbell, Chancellor and Presiding Judge of the New Jersey Court of Errors and Appeals:

The above-named prosecutor-respondent, feeling himself aggrieved by the judgment of the New Jersey Court of Erorrs and Appeals entered on the eighth day of November, 1945, in the above entitled cause reversing the judgment of the New Jersey Supreme Court dated September 14, 1944 in favor of the prosecutor-respondent and against the respondent-appellants, setting aside the resolution adopted by the Respondent-Appellant Board of Education on September 21, 1942, hereby prays your honor to allow an appeal from said judgment of the New Jersey Court of

Errors and Appeals, being the Court of last Resort in the State of New Jersey, to the Supreme Court of the United States, and that a transcript of the record and proceedings and papers on which said judgment was made and entered, duly authenticated, may be ordered to be sent to the said Supreme Court of the United States. That the case is one in which an appeal will lie is shown by the statement of jurisdiction filed herewith and attached hereto.

And prosecutor-respondent prays that said decision and judgment of November 8, 1945, be reversed and that a judgment be rendered in favor of the said prosecutor-respondent herein, appellant in the Supreme Court of the United States.

Dated: February 1, 1946.

Albert McCay, Attorney for and of Counsel with Prosecutor-Respondent.

[fol. 104] [File endorsement omitted.]

[fol. 105] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed February 5, 1946

Now comes the above named Appellant, Arch R. Everson, by Albert McCay, his counsel, and says that in the records and proceedings in the above entitled cause there is manifest error in this, to wit:

1. The New Jersey Court of Errors and Appeals erred in reversing the judgment of the New Jersey Supreme Court setting aside the resolution of the Appellee Board of Education on the ground that said resolution authorizes an unconstitutional gift of public funds in aid of sectarian schools.

2. Said Court erred in refusing to sustain the holding of the New Jersey Supreme Court that Chapter 191, Laws of 1941 of the State of New Jersey, pursuant to which said resolution was adopted, is unconstitutional in that it authorizes the use of public funds for transportation of children to private and sectarian schools.

3. Said Court erred in refusing to hold that said resolution and statute violate the provisions of the 14th Amend-

ment to the Constitution of the United States in that they authorize aid to private and sectarian schools by taxation thus constituting a taking of private property for a private purpose.

4. Said Court erred in refusing to hold that said resolution and statute, even if not considered to be an aid to [fol. 106] private or sectarian schools but an aid only to the children attending such schools, violate the 14th Amendment to the Constitution of the United States in that it constitutes a taking of private property to aid private individuals.

5. Said Court erred in refusing to hold that said resolution and statute violate the 14th Amendment to the Constitution of the United States in that they are legislation respecting the establishment of religion.

6. Said Court erred in refusing to hold that said resolution and statute violate the 14th Amendment to the Constitution of the United States in that they constitute legislation authorizing the support of religious tenents by taxation.

7. Said Court erred in holding that Chapter 191, P. L. 1941 of New Jersey is a valid enactment and not in contravention of the 14th Amendment of the Constitution of the United States.

Albert McCay, Attorney for Appellant.

Challen B. Ellis, of Counsel.

[fol. 107] [File endorsement omitted.]

[fol. 108] In New Jersey Court of Errors and Appeals

[Title omitted]

Order Allowing Appeal to the Supreme Court of the United States—Filed February 5, 1946

The above-named prosecutor-respondent having petitioned the undersigned Presiding Judge of the New Jersey Court of Errors and Appeals for an order allowing said prosecutor-respondent to appeal to the Supreme Court of the United States from the judgment of the New Jersey

Court of Errors and Appeals, the Court of Last Resort of the State of New Jersey, dated November 8, 1945, and a bond, assignment of errors, citation and statement of jurisdiction having been duly presented:

It is, on this fifth day of February, 1946, Ordered that said appeal be and the same is hereby allowed, and appellant's bond in the sum of One Thousand Dollars ($1,000.00) with the Glens Falls Indemnity Company, surety thereon, is hereby approved as to form and sufficiency.

It is further ordered that the clerk of this court be and hereby is directed to prepare and certify a transcript of the record, proceedings, papers and judgment in this cause and transmit same to the Clerk of the United States Supreme Court within thirty days after the entry of this order.

Luther A. Campbell, Chancellor and Presiding Judge of the New Jersey Court of Errors and Appeals.

[fols. 109-114] [File endorsement omitted.]

[fols. 115-116] Citation in usual form, filed Feb. 5, 1946, omitted in printing.

[fols. 117-118] In New Jersey Court of Errors and Appeals

[Title omitted]

Order Recalling Remittitur

A remittitur having been entered on November 8, 1945 remanding the record in this cause to the New Jersey Supreme Court, and an appeal from the judgment of the New Jersey Court of Errors and Appeals having been taken by the prosecutor-respondent to the Supreme Court of the United States.

It is on this 7th day of February, 1946, Ordered that said remittitur dated November 8, 1945, be and hereby is recalled for the purpose of enabling the clerk of this court to certify the record and proceedings in this cause to the clerk of the Supreme Court of the United States.

For the Court, Thomas J. Brogan, C. J. and Pro Tem Presiding Judge of the New Jersey Court of Errors and Appeals.

[fols. 119-120] ACKNOWLEDGMENT OF SERVICE

Service is hereby acknowledged this 9th day of February, 1946, of a true copy of order dated February 7, 1946 recalling remittitur.

William Abbotts, Attorney for Respondents-Appellants.

[fol. 121] IN NEW JERSEY COURT OF ERRORS AND APPEALS

[Title omitted]

PRAECIPE—Filed February 5, 1946

To Clerk of the New Jersey Court of Errors and Appeals, State House, Trenton, New Jersey.

SIR:

Take Notice that you are requested to include in the transcript in the above entitled cause to be filed with the United States Supreme Court, the following:

1. The State of Case filed in the New Jersey Court of Errors and Appeals.
2. The opinion of the New Jersey Court of Errors and Appeals.
3. The judgment of the New Jersey Court of Errors and Appeals.
4. Petition for re-argument and decision thereon.
5. Petition for allowance of appeal to the United States Supreme Court.
6. Order allowing appeal to the United States Supreme Court.
7. Appeal bond.
8. Statement of jurisdiction and points relied on.
9. Assignments of Error.
10. Praecipe.
11. Citation on appeal.
12. Proof of service of petition for allowance of appeal, order allowing appeal, statement of jurisdiction and points [fol. 122] relied on, assignments of error and citation.
13. Certificate of return of clerk of the New Jersey Court of Errors and Appeals.

Respectfully yours, Albert McCay, Attorney for and of Counsel With Prosecutor-Respondent.

ACKNOWLEDGMENT OF SERVICE

Service of copy of the annexed Praecipe in the above entitled cause is hereby acknowledged this 5th day of February, 1946.

William Abbotts, Attorney for Respondents-Appellants.

[fol. 123] [File endorsement omitted.]

[fol. 124] IN NEW JERSEY COURT OF ERRORS AND APPEALS

[Title omitted]

AMENDED PRAECIPE

To: Clerk of the New Jersey Court of Errors and Appeals, State House, Trenton, New Jersey.

SIR:

Take Notice that you are requested to include in the transcript in the above entitled cause to be filed with the United States Supreme Court, the following:

1. The State of Case filed in the New Jersey Court of Errors and Appeals.
2. The opinion of the New Jersey Court of Errors and Appeals.
3. The dissenting opinion filed in the New Jersey Court of Errors and Appeals.
4. The judgment of the New Jersey Court of Errors and Appeals, namely Rule For Reversal and Remittitur entered on November 8, 1945.
5. Petition for leave for re-argument.
6. Decision on application for leave for re-argument.
7. Petition for allowance of appeal to the United States Supreme Court.
8. Order allowing appeal to the United States Supreme Court.

[fols. 125-126] 9. Appeal bond.

10. Statement of jurisdiction and points relied on.
11. Assignments of Error.
12. Citation on appeal.
13. Acknowledgment of service of petition for allowance of appeal, order allowing appeal, statement of jurisdiction and points relied on, assignments of error and citation.

14. Order Recalling Remittitur.
15. Acknowledgment of Service of Order Recalling Remittitur.
16. Praecipe, with acknowledgment of service endorsed thereon.
17. Amended Praecipe, with acknowledgment of service endorsed thereon.
18. Certificate of return of clerk of the New Jersey Court of Errors and Appeals.

Respectfully yours, Albert McCay, Attorney for and of Counsel with Prosecutor-Respondent.

ACKNOWLEDGMENT OF SERVICE

Service of copy of the annexed Amended Praecipe in the above entitled cause is hereby acknowledged this 11th day of February, 1946.

William Abbotts, Attorney for Respondents-Appellants.

[fol. 127] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 128] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed March 14, 1946

Appellant in the above entitled cause, by his counsel, states that he expects to rely upon each and all the assignments of error attached to the record filed herein and adopts the said assignments of error as his statement of the points upon which he intends to rely.

DESIGNATION OF RECORD TO BE PRINTED

The entire record except the Application for Leave for Reargument in the New Jersey Court of Errors and Appeals and the Appeal Bond.

Edward R. Burke, Challen B. Ellis, 504 Southern Building, Washington, D. C., Counsel for Appellant.

Service of the above statement is acknowledged March 13, 1946.

William H. Speer, Counsel for Appellees.

[fol. 129] [File endorsement omitted.]

[fol. 130] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—May 6, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Jackson took no part in the consideration or decision of this question.

[Endorsed on Cover:] File No. 50,614, New Jersey, Court of Errors and Appeals. Term No. 52. Arch R. Everson, Appellant, vs. Board of Education of the Township of Ewing, in the County of Mercer, et al. Filed March 4, 1946. Term No. 52 O. T. 1946.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. [redacted] 52

ARCH R. EVERSON,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

STATEMENT AS TO JURISDICTION

ALBERT MCCAY,
Counsel for Appellant.

CHALLEN B. ELLIS,
Of Counsel.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
Dates of judgment and application for appeal	2
Statement of the case	2
Points and authorities	5
Appendix "A"—Opinion of the Court of Errors and Appeals of New Jersey	18

Table of Cases Cited.

Cole v. *LaGrange*, 113 U. S. 1	5, 7
Dakota Synod v. *State*, 2 S. D. 366, 50 N. W. 632	17
Davis v. *Benson*, 133 U. S. 333	14
Everson v. *Board of Education*, 132 N. J. L. 98, 39 A. (2d) 75, 133 N. J. L. 350, 44 A. (2d) 333	4
Fall Brook Irrigation District v. *Bradley*, 164 U. S. 112	6, 7
Great Northern Ry. Co. v. *State of Minnesota*, 278 U. S. 503	5
Green v. *Frazier*, 253 U. S. 233	7
Gurney v. *Ferguson*, 190 Okl. 254, 122 P. (2d) 1002, 317 U. S. 588, 317 U. S. 707	8, 15, 16
Harfst v. *Hoegen*, 163 S. W. (2d) 609	16
Judd v. *Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576	8, 10, 15, 16
Mitchell v. *Consolidated School Dist. No. 201*, 135 P. (2d) 79	9
Murdock v. *Pennsylvania*, 119 U. S. 105	14
Nashville & St. L. Ry. v. *White*, 278 U. S. 456	5
Opinion of the Justices, In re, 214 Mass. 599, 102 N. E. 464	10
Otken v. *Lamkin*, 56 Miss. 758	10
Parkersburg v. *Brown*, 106 U. S. 487	5, 7
People v. *Westchester County National Bank*, 231 N. Y. 465, 132 N. E. 241	12
People, ex rel. Roman Catholic Orphan Asylum Society in City of Brooklyn v. *Board of Education*, 13 Barb. 400	10

	Page
Reynolds v. *U. S.*, 98 U. S. 145	14
Rutgers College v. *Morgan*, 70 N. J. L. 460, 71 N. J. L. 663	13
Savings and Loan Assoc. v. *Topeka*, 20 Wall. 655	7, 11
State v. *Switzler*, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280	11
State, ex rel. Traub v. *Brown*, 36 Del. 181, 172 A. 835, 197 A. 478	8
State, ex rel. Van Straten v. *Milquet*, 180 Wis. 109, 192 N. W. 392	9
Synod of Dakota v. *State*, 2 S. D. 366, 50 N. W. 632	10
Voorhees, In re, 123 N. J. E. 142, 121 N. J. L. 59, 124 N. J. L. 35	12
Western Turf Assn. v. *Greenberg*, 204 U. S. 359, 27 S. Ct. 384, 51 L. Ed. 520	5
Wilentz v. *Hendrickson*, 133 N. J. E. 447, 135 N. J. E. 244	12
Williams v. *Board of Trustees, Stanton Common School Dist.*, 173 Ky. 708, 191 S. W. 507, 172 Ky. 133, 188 S. W. 1058	10, 17

Statutes Cited

Constitution of New Jersey, Article I:	
Para. 3	4
Para. 4	4
Para. 19	4
Para. 20	4
Constitution of New Jersey, Article IV, Section 7, Para. 6	4
Constitution of the United States, 14th Amendment	1, 2, 4
Laws of 1941 of the State of New Jersey, Chapter 191, entitled "An Act relating to education, and amending Section 18:14-8 of the Revised Statutes"	3
Resolution of the Board of Education of the Township of Ewing of September 21, 1942	2
United States Code Annotated, Title 28, Section 344(a)	1

NEW JERSEY COURT OF ERRORS AND APPEALS

ARCH R. EVERSON,
Prosecutor-Respondent,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL.,
Respondents-Appellants

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS

STATEMENT OF JURISDICTION

The jurisdiction of the United States Supreme Court rests upon the statutory provision contained in United States Code Annotated, Title 28, Section 344, Paragraph (a), which provides:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the constitution, * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The appellant relies on the 14th Amendment to the Constitution of the United States as a basis for the jurisdiction of the United States Supreme Court.

The date of the judgment of the New Jersey Court of Errors and Appeals sought to be reviewed is November 8, 1945.

Petition for re-argument was denied on November 29, 1945.

The application for the allowance of an appeal was presented to the Chancellor and Presiding Judge of the New Jersey Court of Errors and Appeals on February 5, 1946, and was duly allowed on that date. The application and allowance were, therefore, timely.

Statement of the Case

The judgment referred to above upheld the constitutionality of the resolution of the Appellee Board of Education and the Act of the Legislature of the State of New Jersey, hereinafter quoted, which resolution and statute had been duly attacked in the pleadings as being an infringement of the 14th Amendment of the Constitution of the United States and of appellant's rights thereunder. (State of case, N. J. Court of Errors and Appeals, page 15.)

On application of the appellant, a resident and taxpayer of the Township of Ewing, the New Jersey Supreme Court issued a writ of certiorari to review the legality of a resolution adopted on September 21, 1942, which resolution provided:

> "The Transportation Commtt. recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic Schools, by way of public carriers as in recent years. On Motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted."

The statute in question is Chapter 191, Laws of 1941 of the State of New Jersey entitled "An Act relating to educa-

tion, and amending Section 18:14-8 of the Revised Statutes," which reads as follows:

"1. Section 18:14-8, of the Revised Statutes is amended to read as follows:

"18:14-8. Whenever in any district there are children living remote from *any* schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, *including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.*

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part. (Italics ours.)

"Nothing in this section shall be so construed as to prohibit a board of education from making contracts for the transportation of children to a school in an adjoining district when such children are transferred to the district by order of the county superintendent of schools, or when any children shall attend school in a district other than that in which they shall reside by virtue of an agreement made by the respective boards of education.

"2. This act shall take effect July first, one thousand nine hundred and forty-one."

The 1941 amendment (Chapter 191, Laws of 1942) changed the words "the schoolhouse" in the first paragraph of R. S. 18:14-8 to read "any schoolhouse", and the other parts of the statute italicized above were added by said amendment.

Pursuant to the said resolution the Appellee Board of Education agreed to pay for the then current school year

the cost of transportation to such catholic parochial schools approximately $859.80, and on February 15, 1943 authorized the payment of $8,034.95 for transportation, of which $357.74 was paid to the parents of pupils who were transported to such parochial schools.

All of the said schools are Roman Catholic Parochial Schools in the City of Trenton, and religion is taught as part of the curricula in each of said schools. A priest of the Catholic Church is the Superintendent of said schools.

In the New Jersey Supreme Court appellant contended that the resolution and statute violated certain provisions of the State Constitution and the 14th Amendment of the Constitution of the United States.

The New Jersey Supreme Court held (132 N. J. L. 98, 39 A. 2d 75) that the resolution and statute violated certain provisions of the Constitution of New Jersey and entered judgment for this appellant setting aside the resolution.

The New Jersey Court of Errors and Appeals (133 N. J. L. 350, 44 A. 2d 333) pointed out in its opinion that the record before it showed that the reasons advanced in the New Jersey Supreme Court and in the New Jersey Court of Errors and Appeals "in support of the judgment under review are that the statute, upon which the resolution is based, is infirm and inoperative because it contravenes several constitutional inhibitions, namely, Article I, paragraphs 3, 4, 19 and 20; Article IV, Section 7, paragraph 6, of the Constitution of this State, N. J. S. A.; and the Fourteenth Amendment to the Constitution of the United States", but held "that the legislature may appropriate general state funds or authorize the use of local funds for the transportation of pupils to any school", and entered judgment reversing the judgment of the New Jersey Supreme Court.

Thus, there is presented a suit wherein is drawn in question the validity of a statute of the State of New Jersey and

validity of a resolution of the Appellee Board of Education on the ground of their being repugnant to the Constitution of the United States in which the decision of the highest court of that state was in favor of the validity of the statute and resolution.

Wherefore, it is submitted that the United States Supreme Court has jurisdiction to review the judgment appealed from.

Points and Authorities

1

Appeal is the remedy for review of a decision of a State Court of last resort in favor of the validity of a state law, where the state law is alleged to infringe the Federal Constitution.

Western Turf Ass'n vs. *Greenberg*, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520;

Great Northern Ry. Co. vs. *State of Minnesota*, 278 U. S. 503;

Nashville and St. L. Ry. vs. *White*, 278 U. S. 456.

2

The validity of a statute which can only be fulfilled by resort to taxation depends on the power of the state to levy the tax for the purpose for which the tax fund is to be used.

Parkersburg v. *Brown*, 106 U. S. 487, 501:

"Taxation to pay the bonds in question (bonds were issued by City to finance a private enterprise) is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person."

Cole v. *LaGrange*, 113 U. S. 1, 6:

"The general grant of legislative power in the Constitution of a State (Missouri) does not enable the

Legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent for any but a public object. Nor can the Legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. * * * These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject."

3

The action of a state in leving taxes for a private, as distinguished from a public purpose, raises a constitutional question under the 14th Amendment to the Constitution of the United States.

Fall Brook Irrigation District v. *Bradley*, 164 U. S. 112, 158:

"In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the State is confined to its depriving any person of life, liberty, or property, without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State instead of the Federal government."

4

That statutes authorizing aid to private schools by taxation authorize a levy of taxes for a private, as distinguished

from a public purpose, is a principle established and approved by the decisions of the United States Supreme Court. *Savings and Loan Asso.* v. *Topeka*, 20 Wall. 655:

"We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose. . . .

. . . . . .

"The same court had previously decided, in the case of *Jenkins* v. *Anderson* (Andover, 103 Mass. 94, that a statute authorizing the town authorities to aid by taxation a school established by the will of a citizen, and governed by trustees selected by the will, was void because the school was not under the control of the town officers, and was not, therefore, a public purpose for which taxes could be levied on the inhabitants.

"The same principle precisely was decided in the case of *Curtis* v. *Whipple*, 24 Wis. 350. In that case a special statute which authorized the town to aid the Jefferson Liberal Institute was declared void because, though a school of learning, it was a private enterprise not under the control of the town authorities. In the subsequent case of *Whiting* v. *Fond du Lac*, already cited, the principle is fully considered and reaffirmed.

"The cases are clearly in point, and they assert a principle which meets our cordial approval."

The principles decided in that case have never been denied in the United States Supreme Court, but on the contrary they have frequently been cited with approval. *Parkersburg* v. *Brown*, 106 U. S. 487; *Cole* v. *LaGrange*, 113 U. S. 1; *Fall Brook Irrigation District* v. *Bradley*, 164 U. S. 112; *Green* v. *Frazier*, 253 U. S. 233.

5

The furnishing of transportation by the state to children attending private or sectarian schools is essentially, and as a practical matter, an aid to such schools.

Judd v. *Board of Education*, 278 N. Y. 200, 15 N. E. 2d 576:

> "Free transportation induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. • • • It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid."

State ex rel. Traub v. *Brown*, 36 Delaware 181, 172 A. 835, writ of error dismissed, 197 A. 478:

> "We are of the opinion that to furnish free transportation to pupils attending sectarian schools, is to aid the schools. It helps build up, strengthen and make successful the schools as organizations."

Gurney v. *Ferguson*, 190 Okl. 254, 122 P. 2d 1002, *certiorari* denied, 317 U. S. 588, rehearing denied, 317 U. S. 707:

> "It is urged that the present legislative act does not result in the use of public funds for the benefit or support of this sectarian institution or school 'as such'; that such benefit as flows from these acts accrues to the benefit of the individual child or to a group of children as distinguished from the school as an organization. That argument is not impressive. • • • It is true this use of public money and property aids the child. We are convinced that this expenditure, in its broad and true sense, and as commonly understood, is an expenditure in furtherance of the constitutional duty or function of maintaining schools as organizations or institutions. The state has no authority to maintain a sectarian school. Surely the expenditure of public funds for the erection of school buildings, the purchasing and equipping and the upkeep of same; the payment of teachers, and for other proper related purposes is expenditure made for schools as such. Yet the same argument is equally applicable to those expenditures as to the present one.

"If the cost of the school bus and the maintenance and operation thereof was not in aid of the public schools, then expenditures therefor out of the school funds would be unauthorized and illegal. Yet, we assume it is now acquiesced in by all that such expenditures are properly in aid of the public schools and are authorized and legal expenditures. If the maintenance and operation of the bus and the transportation of pupils is in aid of the public schools, then it would seem necessarily to follow that when pupils of a parochial school are transported that such service would likewise be in aid of that school."

Mitchell v. *Consolidated School Dist. No. 201* (Supreme Court of the State of Washington), 135 P. 2d 79:

"We cannot, however, accept the validity of the argument that transportation of pupils to and from school is not beneficial to, and in aid, of the school. Even legislation providing for transportation of pupils to and from public schools is constitutionally defensible only as the exercise of a governmental function furthering the maintenance and development of the common school system. . . .

. . . . . .

"We think the conclusion is inescapable that free transportation of pupils serves to aid and build up the school itself."

Sherrard v. *Jefferson County Board of Education*, 294 Ky. 469, 171 S. W. 2d 963.

State ex rel. Van Straten v. *Milquet*, 180 Wis. 109, 192 N. W. 392.

The state should not be permitted to do indirectly what it cannot do directly.

The courts of this country have been unanimous in prohibiting a use of public funds to pay, *directly or indirectly*, tuition fees of pupils in private or sectarian schools.

Williams v. *Board of Trustees, Stanton Common School Dist.*, 173 Kentucky 708, 191 S. W. 507, reversing on rehearing, 172 Kentucky 133, 188 S. W. 1058, and discarded.

Otken v. *Lamkin*, 56 Miss. 758.

Synod of Dakota v. *State*, 2 S. D. 366, 50 N. W. 632.

In re Opinion of the Justices, 214 Mass. 599, 102 N. E. 464.

People ex rel. Roman Catholic Orphan Asylum Society in City of Brooklyn v. *Board of Education*, 13 Barb. 400.

If the judgment of the court below is not reversed, it will be within the discretion of the legislature, free of constitutional restraint, to provide for practically the entire cost of education in private and parochial as well as in public schools, by paying to the parents the amount of such costs. The state will be permitted to do indirectly what it cannot do directly.

Judd v. *Board of Education*, 278 N. Y. 200, 15 N. E. 2d 576:

> "Aid furnished 'directly' would be that furnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked, and without circumlocution or ambiguity. Aid furnished 'indirectly' clearly embraces any contribution, *to whomsoever made*, circuitiously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interest and purposes."

7

If the furnishing of transportation to children attending private and sectarian schools is not to be considered an aid to such private schools but an aid only to the children attending such schools, then the tax levied for such purpose is equally obnoxious to the federal constitution because it constitutes a diversion of public property to private individuals without distinction as to need for charity and

without any special obligation of the state, charitable or otherwise, to such persons.

Savings and Loan Asso. v. *Topeka,* 20 Wall. 655:

> "To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation."

The same principle has been enunciated in state courts, and applied to use of public funds to aid those attending private schools.

State v. *Switzler,* 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280:

> "The act under consideration endows the scholar, not the university. * * * It is a pure and simple gift of public money by the state to private individuals, for their own private use. * * *
>
> "It is only necessary to add that counsel for the curators do not attempt to maintain this tax on the theory that the young men and women who would obtain these scholarships are paupers, in the meaning of the law. Even without this admission, it is perfectly apparent that the act, by its terms, does not confine this pension to the children of poor persons who may, in a legal sense, be denominated 'paupers'."

8

If the furnishing of transportation to children attending private and sectarian schools is not to be considered an aid to such schools but an aid only to the children attending such schools, then the tax levied for such purpose is equally obnoxious to the federal constitution because it constitutes a taking of private property to aid private individuals for

a purpose which is not effectuated by or through a public agency.

People v. *Westchester County National Bank*, 231 N. Y. 465, 132 N. E. 241, 244:

> "Whether the purpose is a public one, therefore, is no longer the sole test as to the proper use of the state's credit. Such a purpose may not be served in one particular way. However important, however useful the objects designed by the legislature, they may not be accomplished by a gift or a loan of the credit to an individual or a corporation. It will not do to say that the character of the act is to be judged by its main object—that because the purpose is public, the means adopted cannot be called a gift or a loan."

Prior to the judgment of the court below, the same principle was recognized and was applied by the courts of New Jersey to statutes in aid of education.

Wilentz v. *Hendrickson*, 133 N. J. E. 447, 480, affirmed 135 N. J. E. 244:

> "These constitutional amendments were, however, directed at the means of effectuating that public purpose. The were intended to prevent the accomplishment of that purpose by the means of aid to private corporations not constituting public agencies controlled by the state."

In re Voorhees, 123 N. J. E. 142, 147, affirmed 121 N. J. L. 594, affirmed 124 N. J. L. 35:

> "And in *Trustees of Newark Free Public Library* v. *Civil Service Commission*, 83 N. J. Law 196, 83 Atl. Rep. 980; aff'd 86 N. J. Law 307, 90 Atl. Rep. 261, the constitutional validity of the appropriation of public moneys by municipalities to free public libraries is rested on the ground that the libraries in question were public agencies for public education and the appropriations are expenditures by the state or muni-

cipality for such public education *through* such agents." (Italics by court.)

Rutgers College v. *Morgan*, 70 N. J. L. 460, 473, affirmed 71 N. J. L. 663:

> "This provision, as well as that relating to special laws, does not bar instrumentalities for public education *provided by the state and under its control* by general laws where the appropriation is made for such schools. They were designed as an insurmountable barrier to giving free state aid, and to donations to private or sectarian schools, and should be rigidly enforced; but they were not intended to narrow or circumscribe the legislative power to furnish facilities by general laws for *public* education *under its own supervision.*" (Italics ours.)

A statute authorizing transportation of children to private and sectarian schools is not in aid of an agency or instrumentality of the state for public education provided by the state and under its control and supervision.

9

A statute which does not provide for transportation of pupils generally but only of pupils attending public schools and non-profit private schools constitutes a taking of private property for a private purpose in so far as the transportation of pupils attending non-profit private schools is concerned.

10

A resolution which authorizes transportation of children to Catholic schools, and makes no provision for transportation of children attending sectarian schools other than Catholic schools, segregates the schools and the pupils designated as beneficiaries and constitutes a taking of private property for a private purpose.

11

That a statute respecting an establishment of religion or authorizing the support of any religious tenets by taxation is prohibited by the federal constitution is a principle established and approved by the decisions of the United States Supreme Court.

Reynolds v. *United States*, 98 U. S. 145:

> "Before the adoption of the Constitution, attempts were made in some of the Colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion and sometimes for the support of particular sects to whose tenets they could not and did not subscribe."

Davis v. *Benson*, 133 U. S. 333:

> "The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of a religion, or forbidding the free exercise thereof, was intended * * * to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect."

12

The Fourteenth Amendment makes applicable to the states and their subdivisions the guaranties of religious liberty contained in the First Amendment.

Murdock v. *Pennsylvania*, 119 U. S. 105, 108:

> "The First Amendment, which the Fourteenth Amendment makes applicable to the States, declares that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

A statute or resolution authorizing the use of tax moneys for the purpose of furnishing transportation to children attending sectarian schools is legislation respecting an establishment of religion.

Judd v. *Board of Education*, 278 N. Y. 200, 15 N. E. 2d 581, 582, a case holding such a statute unconstitutional:

> "While a close compact had existed between the Church and State in other governments, the Federal government and each State government from their respective beginnings have followed the new concept whereby the State deprived itself of all control over religion and has refused sectaries any participation in or jurisdiction or control over the civil prerogatives of the State. And so in all civil affairs there has been a complete separation of Church and State jealously guarded and unflinchingly maintained. • • • Any contribution directly or indirectly made in aid of the maintenance and support of any private or sectarian school out of public funds would be a violation of the concept of complete separation of Church and State in civil affairs and of the spirit and mandate of our fundamental law."

Gurney v. *Ferguson*, 190 Okl. 254, 122 P. 2d 1002, certiorari denied, 317 U. S. 588, rehearing denied, 317 U. S. 707, another case in which a state court held such a statute unconstitutional:

> "In that connection we must not overlook the fact that if the Legislature may directly or indirectly aid or support sectarian or denominational schools with public funds, then it would be a short step forward at another session to increase such aid, and only another short step to some regulation and at least partial control of such schools by successive legislative enactment. From partial control to an effort at complete

control might well be the expected development. The first step in any such direction should be promptly halted, and is effectively halted, and is permanently barred by our Constitution."

Harfst v. *Hoegen* (Missouri Supreme Court), 163 S. W. 2d 609:

"The constitutional policy of our State has decreed the absolute separation of church and State, not only in governmental matters, but in educational ones as well. Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise."

The operation of a church school under the direction of, and teaching the tenets of, a church, is a primary function whereby that church puts its impress upon and holds the children of the church to its faith. The parochial schools are a part of the ministration of the church under whose control they are. The ministry of the church is concerned and connected therewith. Specifically, in this case, religion is taught in the schools and a priest of the church is the superintendent of the schools.

14

A statute or resolution authorizing the use of tax moneys for the purpose of furnishing transportation to children attending sectarian schools is legislation for the support of religious tenets.

Judd v. *Board of Education*, 278 N. Y. 200, 15 N. E. 2d 581.

Gurney v. *Ferguson*, 190 Okl. 254, 122 P. 2d 1002, certiorari denied, 317 U. S. 588, rehearing denied, 317 U. S. 707.

Harfst v. *Hoegen* (Missouri Supreme Court), 163 S. W. 2d 609.

Dakota Synod v. *State*, 2 S. D. 366, 50 N. W. 632.
Williams v. *Stanton Common School District*, 173 Ky. 708, 191 S. W. 507.

15

The resolution of the Appellee Board of Education is legislation respecting an establishment of religion and for the support of religious tenets in that it contains no provision for the transportation of children to sectarian schools generally, but segregates the schools and the pupils designated as beneficiaries, and makes no provision for transportation of children attending sectarian school other than Catholic schools.

Respectfully submitted,

ALBERT MCCAY,
Counsel for Appellant.

CHALLEN B. ELLIS,
Of Counsel.

APPENDIX "A"

NEW JERSEY COURT OF ERRORS AND APPEALS,
MAY TERM, 1945

No. 32

ARCH R. EVERSON, *Prosecutor-Respondent,*

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the COUNTY OF MERCER, et als., *Respondents-Appellants*

Appeal from the Supreme Court on Certiorari

Argued May 21, 1945; decided October 15, 1945.

Syllabus

P. L. 1941, Chapter 191 held to be a valid enactment and not in contravention of Article 1, paragraphs 3, 4, 19 and 20, or Article 4, Section 7, paragraph 6 of the Constitution of this State or the Fourteenth Amendment to the Constitution of the United States.

For respondents-appellants, William H. Speer, of counsel; William Abbotts, attorney of record; George G. Tennant and Joseph Lanigan, amici curiae.

For prosecutor-respondent, Albert McCay, of counsel; Powell and Parker, attorneys of record; Joseph Beck Tyler, attorney and of counsel with American Civil Liberties Union, amicus curiae.

The Opinion of the Court was delivered by the CHANCELLOR:

This is an appeal from a judgment of the Supreme Court, on certiorari, setting aside a resolution of the appellant Board of Education enacted under the authority of R. S. 18:14-8 as amended by P. L. 1941, Chapter 191 providing for the transportation of pupils for the school year, July 1, 1942 to June 30, 1943.

Pursuant to such resolution the appellant on February 15, 1943 authorized the payment of $8,034.95 for transporta-

tion. Of this sum $357.74 was paid to the parents of twenty-one pupils who were transported to parochial schools in Trenton, five to elementary schools and sixteen to high schools. The appellant provides no education facilities in its district beyond the eighth grade. The transportation was by public carrier bus. The payments to parents were in satisfaction of advancements made by them; and the amount was fixed upon the basis of the actual number of days' attendance as indicated upon each pupil's report card.

The record before us shows that the reasons advanced in the Supreme Court and here in support of the judgment under review are that the statute, upon which the resolution is based, is infirm and inoperative because it contravenes several constitutional inhibitions, namely: Article I, paragraphs 3, 4, 19 and 20; Article IV, Section 7, paragraph 6, of the Constitution of this State; and, the Fourteenth Amendment to the Constitution of the United States.

None of these several provisions of the Constitution, except that of Article IV, Section 7, paragraph 6, requires any discussion. For neither their language, meaning, intent, nor effect are violated by the statute, supra, or the resolution challenged in this proceeding.

We turn at once to the reason that the statutory enactment is constitutionally defective because it is said that it is in conflict with Article IV, Section 7, paragraph 6.

It appears from the majority opinion of the Supreme Court that it based its conclusion and judgment "on the foundamental ground that the amendment of 1941 is in violation of paragraph 6 of Section 7 of Article IV of the Constitution" citing as authority Rutgers College vs. Morgan, 70 N. J. L. 460 affd. 71 N. J. L. 663 and In re Voorhees, 123 N. J. Eq. 142 affd. 121 N. J. L. 594 (Supreme Court) affd. here, 124 N. J. L. 35. We find in the minority opinion the statement "There is no proof whatever that any part of the State School Fund was so used here". A meticulous examination of the record shows an absolute lack of any such proof.

The duty of this court in such a situation is well established. It is settled that findings of fact by the Supreme

Court on conflicting evidence or on uncontroverted evidence reasonably susceptible of different inferences are conclusive on appeal, Jersey City vs. State Water Policy Commission, 118 N. J. L. 72, 77; Siravo vs. Sirian Lamp Co., 124 N. J. L. 433. It is also settled that we do not hesitate to reverse where there is no competent evidence to support a fact conclusion arrived at below, Ciocca vs. National Sugar Refining Co., 124 N. J. L. 329, 335; Cirillo vs. United Engineers, etc., 121 Id. 511, 512; Grant vs. Metropolitan Ice Co., 108 Id. 536, 537 and further that this Court will reverse any material fact conclusion if it rests on erroneous premises. Bollinger vs. Wagaraw Building Supply Co., 122 N. J. L. 512, 517; Ciocca vs. National Sugar Refining Co., supra, 335; Rotino vs. J. P. Scanlon, Inc. 126 Id. 419, 421.

As said, the record before us is barren of any evidence as to the source of the funds from which the challenged payment of $357.74 was made.

In this state of proof we must assume that the payment was made lawfully, from funds under appellant's control. We may not assume, in the absence of proof, that the moneys were taken from the appellant Board's distributive share of the income of the State School Fund, R. S. 18:10-1 to 17.

The history of the State School Fund—"The Fund for the support of free schools"—may be traced from its origin in P. L. 1817, pam. 26 as amended by P. L. 1818, pam 100 and succeeding statutory amendments and supplements. Pennington's Revision (1821) p. 612, 649, 660; Nixons Digest (4th Ed. 1868) p. 877, sec. 65-75; Revision (1877) p. 1081, sec. 65-76 and p. 1087, sec. 101, 102; 3 Gen. Stat. 3030, sec. 65-76; 4 Comp. Stat. 4778, sec. 166-176; R. S. 18:10-1 to 17. Therein is perceived the bases and reason for the constitutional provision relied on by the Supreme Court which was originally inserted in the basic law in 1844.

This constitutional provision of 1844 stripped the legislature of the power it had reserved to itself in P. L. 1818, pam. 100, to change, alter or dissolve this trust fund. The capital of the fund and the income therefrom were protected against trespass by the legislature. State vs. Rutherford, 98 N. J. L. 465, 467. The constitutional provision together with other statutes identifies the fund therein referred to.

The amendment of this paragraph of the Constitution in 1875 had an entirely different purpose than the provision just discussed. The amendment of 1875 was a mandate to the legislature to broaden the field of free public school education and pursuant to this mandate legislation was enacted to pay the cost of such education by providing for the raising of a state school tax, delegating taxing powers to local school districts to raise funds for local school purposes and dedicating certain railroad taxes and other state funds for the same purpose. These were all statutory provisions and were subject to alteration, modification, and repeal by subsequent legislation untrammeled by the constitutional inhibition applicable to the fund for the support of free schools. The legislature already had the necessary power and the amendment of 1875 neither increased nor limited it in any particular.

Nothing appears on the face of the resolution or the challenged statute that could be construed to authorize the use by the appellant of any of its apportioned share of the income of the fund for the support of free schools, R. S. 18: 10-1 to 17, to pay the cost of transportation of pupils to parochial schools.

We are asked to imply that the statute and resolution authorize the use of constitutionally prescribed funds for such purpose.

This we may not do. The rule is that courts will presume in favor of the constitutionality of a statute and will incline to a construction favoring its validity unless its invalidity plainly appears. State vs. Tachin, 92 N. J. L. 269, 274 affd. 93 Id. 485; State Board of Milk Control vs. Newark, 118 N. J. Eq. 504, 519; State vs. Murzda, 116 N. J. L. 219, 223.

We are likewise urged to construe R. S. 18: 10-41 as indicating an unconstitutional use of money by the appellant. This section requires the county superintendent of schools to apportion the State School moneys allotted to the county to the respective school districts for certain purposes designated therein.

Let it be noted here that all funds included in the phrase "state school moneys" are not within the constitutional inhibition relied on by the respondent. The section, how-

ever, requires the County Superintendent to apportion out of State School moneys "Seventy-five per cent of the cost of transportation of pupils to *public school or schools* * * *."

The language is clear and unambiguous.

In the case before us the total transportation cost was $8,034.95 for a half year which included $357.74 as the cost of transporting parochial school pupils and in the absence of proof to the contrary we must assume that the County Superintendent obeyed the statute and based the allotment on the cost of transporting the pupils to the public school or schools.

School districts, such as the appellant, are authorized by R. S. 18: 7-78 to raise by special district taxes funds to defray certain current charges and expenses of the public schools in their districts including "transportation of pupils * * *" and "the incidental expenses of the schools."

Funds so raised are not proscribed or limited in their use by Article IV, Section 7, paragraph 6 of the Constitution.

The intent of P. L. 1941, Chapter 191 is that pupils may be transported to parochial schools only as an incident to the transportation of pupils to the public schools since the statute provides that children attending schools could be furnished transportation by any school district from any point *on an already established school route* to any other point *on such established school route.* Payment of such expense out of local taxes is the payment of "incidental expenses" or "transportation of pupils" authorized by R. S. 18: 7-78.

Since we hold that the legislature may appropriate general state funds or authorize the use of local funds for the transportation of pupils to any school, we conclude that such authorization of the use of local funds is likewise authorized by P. L. 1941, Chapter 191, and R. S. 18: 7-78. The legislature clearly intended once the transportation of such pupils was contracted for, that it should be paid out of funds constitutionally available for the purpose.

It is next urged the R. S. 18: 14-8 as amended by P. L. 1941, Chapter 191, is violative of *Artice* I, paragraphs 19 and 20 because the payment of transportation costs of

pupils attending schools is the giving of direct or indirect aid to sectarian schools or amounts to a gift to an individual.

Compulsory education has long been a requirement in this State. P. L. 1874, Chapter 522; p. 135; P. L. 1875, Chapter 443, p. 105; P. L. 1885, Chapter 217, p. 280; 3 Gen. Stat. p. 3061, Sec. 255; 4 Comp. Stat. p. 4775, Sec. 153, et seq.; R. S. 18: 14-14 as amended P. L. 1940, Chapter 153, P. 346; R. S. 18: 14-34, 39, 40.

It is a matter of public concern and legislative regulation and should be enforced as long as the requirements are reasonable. Of course this is subject to constitutional limitations, Pierce vs. Society of Sisters, etc. 268 U. S. 510; 45 S. Ct. 571, 69 L. ed. 1070.

It is a public matter within the legislative prerogative concerning which the legislature may act and has, by the statutes including that here considered.

The compulsory education statutes impose on the *parents*, not the children, an absolute duty subject to three exceptions, physical or mental disability of the child or adequate provision by private teaching other than in a recognized day school. The statute is penal in nature for a violation of which parents may be convicted as disorderly persons, R. S. 18: 14-34, 39, 40.

Many situations could arise, where, without regular means of transportation, parents would be placed in a situation which made it practically impossible to comply with the compulsory education requirements and therefore without wilful intent to evade or transgress, would become subject to the penalties established for failure to perform the duty imposed.

It was to meet this mischief that the original statute authorizing the transportation of pupils living remote from the schools was enacted. The statutes looking to transportation became complementary to and in aid of the compulsory education statutes.

It is a public matter and moneys expended therefore, except those prohibited by the Constitution of this State, do not constitute the expenditure of public moneys for private purposes.

We conclude that there is nothing on the face of the resolution or statute or in the record before us showing

that either the statute or the resolution enacted thereunder is unconstitutional or does violence to the Constitution for any of the reasons urged.

The judgment of the Supreme Court is reversed and the cause remanded to the end that the writ of certiorari be dismissed.

Endorsed: "Filed October 15, 1945, J. A. Brophy, Clerk."

NEW JERSEY COURT OF ERRORS AND APPEALS

No. 32, May Term, 1945

Arch R. Everson, *Prosecutor-Respondent*,

vs.

Board of Education of the Township of Ewing, in the County of Mercer, et als., *Respondents-Appellants*

Case, J. (Dissenting):

The issue is the constitutionality of reimbursement by the Board of Education of the Township of Ewing, from public moneys, to parents, resident in the township, for the bus fares paid by their children on public buses between the township and the City of Trenton, in which city the children attended certain Roman Catholic parochial schools. The religion of the church was taught in each of the schools as a part of the curriculum. A priest of the church was the superintendent of the schools. The resolution under review made no provision for transportation to private or sectarian schools other than Catholic schools and therefore did not make provision for children generally. Further, it made no change in the method of transportation and so added nothing to protection against traffic hazards. The transportation had been and continued to be by public buses running on their usual schedules. The township public schools extend through the eighth grade. Public school children beyond those elementary grades are transported either to Trenton or Pennington. Some of the parochial school children transported to Trenton were in the elementary

grades and some in the high school grades. Consequently the parochial school children in the elementary grades were transported to the City of Trenton although the public school children in those grades were received and taught in the schools within the school district. It must be assumed that these various arrangements were within the purview of the statute; else the resolution of the Board of Education was itself without statutory authority and therefore void. The resolution was as follows:

> "The Transportation Commtt. recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic Schools, by way of public carriers as in recent years. On Motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted."

The resolution is rested upon the second paragraph of R. S. 18:14-8 as amended by ch. 191, P. L. 1941:

> "18:14-8. Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.
>
> When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part."

A major question is whether the furnishing of transportation to private or parochial schools out of public money is in aid or support of such schools and whether constitutional provisions which prohibit such aid or support are violated by statutory authority for transportation. The argument that such disbursements are not in aid of the schools

is based upon what is known as the "child-benefit" theory which presents as a distinction that the charges are for the benefit of the children rather than of the schools. That theory seems to have first been given judicial sanction in the State of Louisiana where the courts sustained a statute which permitted the use of public funds to purchase school books for distribution, free of cost, apparently as a loan, to "the school children of the state", a classification which by its broad terms included children in attendance at private and parochial schools. *Borden vs. Louisiana State Board of Education*, 168 La. 1005, 67 A. L. R. 1183, *Cochran vs. Louisiana State Board of Education*, 168 La. 1030. The latter case went to the United States Supreme Court (281 U. S. 370, 74 L. Ed. 913) where it was held that the legislation was not in violation of the 14th amendment to the United States constitution. Chief Justice Hughes, holding the opinion for the court (April 28, 1930), after quoting at length from the opinion of the Louisiana Supreme Court to the effect that the appropriations were "for their (viz., the children's) benefit and the resulting benefit to the state", said (italics inserted):—

> "*Viewing the statute as having the effect thus attributed to it*, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation *does not segregate private schools or their pupils*, as its beneficiaries • • •."

I am unable to find more in the federal decision than that, first, the Supreme Court accepted the finding of the state court upon the purpose and effect of the state statute and, second, that the statute, given the purpose and effect thus attributed to it, with the added incident that it did not segregate its beneficiaries, was not in violation of the 14th amendment. That the Supreme Court accepts the construction by a state court of a state statute in such a case is manifested by the fact that some years later it twice (317 U. S. 588, 63 Sup. Ct. 34, 87 Law. Ed. 481; 317 U. S. 707, 63 Sup. Ct. 153, 87 Law. Ed. 564) refused *certiorari* to review the decision of the Oklahoma Supreme Court coming to an opposite conclusion regarding "child-benefit" in *Gurney vs. Ferguson, infra.*

The "child benefit" theory seems to have received judicial support in only three jurisdictions, Louisiana (already discussed), Mississippi (*Chance vs. Mississippi State Textbook R. & P. Board,* 200 Southern 706), which followed the Louisiana reasoning in the construction of a statute of like import, and Maryland; and the last mentioned is the only jurisdiction, so far as appears, where the paying from public funds of transportation costs for children in private or sectarian schools has been judicially approved. In both Louisiana and Mississippi the subject matter was the free distribution of certain textbooks, and the provision was for the benefit of the children of the state, generally. In the State of Maryland it was held that a statute providing for transportation of children to private or parochial schools in the regular public school buses was constitutional, *Board of Education of Baltimore County vs. Wheat*—May 20, 1938—199 Atl. 628, and, several years later, that contributions from public money to the parochial schools for transportation in their own buses was likewise constitutional, *Adams vs. County Commissioners of St. Mary's County*—May 26, 1942—26 Atl. 2d 377. The trend from the one to the other of these two cases toward enlargement of the powers is to be observed.

The "child-benefit" argument is made here. Among its weaknesses, as a means of avoiding constitutional inhibitions, are its vagueness and the impossibility of satisfactorily distinguishing one item of expense from another in the long process of child education. Counsel for the appellants herein say of the theory that its

> "denomination, because of its generality, may be misleading, and we call it so here purely for identificatory purposes. It connotes so much more than merely the benefit to the child and has been so often and so authoritatively held so to do, that we deem it proper to mention the fact here, i. e., it connotes a huge and perhaps principal benefit to the State, in contributing to the advancement of education, the promotion of literacy, the health and safety of its citizens, that it seems too narrow and insufficient to confine it in such a verbal straight jacket."

That observation made in support of the disbursements nevertheless emphasizes the almost limitless extent of the "child-benefit" theory. We quickly perceive that it applies not merely to transportation costs but to the potential costs of the many and varied items entering into modern education. There is no logical stopping point. Related items, already in the public school system, in addition to the vast field having to do with the actual imparting of knowledge, are the installation and maintenance of cafetèrias, the preservation and promotion of the health of pupils, the employment of medical inspectors and nurses, the keeping of records of development and growth, and the supervision of athletic activities and bodily exercise. I am unable to distinguish between the logic of using public funds for one as against another of the several parts of the system pursued by the public schools toward "the advancement of education, the promotion of literacy and the health and safety" of the pupils. Every step in the educational process is, presumably, for the benefit of the child and, therefore, theoretically, for the benefit of the state. Consequently, if the argument is sound, it is within the discretion of the legislature, free of constitutional restraint, to provide for practically the entire cost of education in private and parochial as well as in public schools.

On the contrary, the courts of at least six states have held that the private or parochial schools attended by the children are beneficiaries of such legislation and that the legislation violates constitutional provisions which prohibit benefactions of that character. *State ex rel. Traub vs. Brown* (1934), 6 W. W. Harr. 32, 36 Del. 181, 172 Atl. 835 (writ of error dismissed 39 Del. 187, 197 Atl. 478); *Gurney vs. Ferguson* (1941), 190 Okla. 54, 122 Pac. 2d 1002; *Judd vs. Board of Education* (1938), 278 N. Y. 200, 15 N. E. 2d 576; *Mitchell vs. Consolidated School District* (Wash. 1943), 135 Pac. 2d 79; *Williams vs. Board of Trustees* (1917), 173 Ky. 708, 191 S. W. 507, L. R. A. 1917D 453; *Sherrard vs. Jefferson County Board of Education* (1943), 294 Ky. 469, 171 S. W. 2d 963; *Von Straten vs. Milquet* (1923), 180 Wisc. 109, 192 N. W. 392. The following

excerpts will indicate how positively those courts have expressed themselves:

From *Judd vs. Board* (New York Court of Appeals):

> "The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils. That argument is utterly without substance. * * * Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. * * * It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid. * * * The courts of this country have been unanimous in prohibiting a use of public funds to pay, directly or indirectly, tuition fees of pupils in private or sectarian schools (citing cases) in spite of the argument presented that tuition fees were for the benefit of pupils exclusively and not for the schools."

From *State ex rel. Traub vs. Brown* (Delaware Superior Court):

> "We are of the opinion that to furnish free transportation to pupils attending sectarian schools, is to aid the schools. It helps build up, strengthen and make successful the schools as organizations. The relators cite in opposition to the above cases, the case of Borden vs. Louisiana State Board of Education, 168 La. 1005, 123 So. 655, 67 A. L. R. 1183. We are not impressed by the reasoning of this case."

From *Gurney vs. Ferguson* (Oklahoma Supreme Court):

> "It is argued that the present legislative act (providing for transportation of pupils attending public schools) does not result in the use of public funds for the benefit or support of this sectarian institution or

school "as such"; that such benefit as flows from these acts accrues to the benefit of the individual child or to a group of children as distinguished from the school as an organization. That argument is not impressive. * * * It is true this use of public money and property aids the child, but it is no less true that practically every proper expenditure for school purposes aids the child."

From *Mitchell vs. Consolidated School District* (State of Washington Supreme Court):

"We think the conclusion is inescapable that free transportation of pupils serves to aid and build up the school itself. That pupils and parents may also derive benefit from it, is beside the question."

In *Sherrard vs. Jefferson County Board* the Kentucky Court of Appeals dealt with the question of transportation costs, rejected the "child-benefit" theory, approved the reasoning in *Gurney vs. Ferguson, supra,* and gave favorable citation of *State ex rel. Traub vs. Brown* and other decisions mentioned above. The A. L. R. annotator, by way of a resumé of the law held in the cases reported and annotated in 63 A. L. R. 413, 118 A. L. R. 806 and 141 A. L. R. 1152, makes (Vol. 141, p. 1152) this well-supported observation:

"It seems to have been held, in most cases, that the transportation of pupils to a sectarian school amounts to the appropriation of moneys in aid of the school and is therefore unconstitutional."

It is the consensus of the weight of judicial opinion that the "child-benefit" theory, is an ingenious effort to escape constitutional limitations rather than a sound construction of their content and purpose. I conclude that the furnishing of transportation to private or parochial schools out of public money is in aid or support of such schools and is in violation of constitutional provisions which prohibit such aid or support. On the assumption

that that is the correct answer to the posed question I proceed to consider our constitutional provisions:

Article 4, sec. 7, para. 6 of our state constitution provides:

> "The fund for the support of free schools, and all money, stock and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public free schools, for the equal benefit of all the people of the state; and it shall not be competent for the legislature to borrow, appropriate or use the said fund or any part thereof, for any other purpose, under any pretense, whatever. The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years."

There can be no doubt that the paragraph was violated if proceeds from the school fund were involved. The majority opinion takes the stand that the record before us is barren of any evidence as to the source of the funds from which the challenged payment was made, and so assumes that the disbursement was from other moneys. I suggest that while there is not specific proof that the payment contained any part of the school fund proceeds, nevertheless there is evidence from which an inference of such a fact may legitimately be drawn and that, such being the case, the thoroughly established jurisdiction of the Supreme Court to find facts, on *certiorari*, which are binding upon us should control here. There was not the slightest suggestion in the proofs that the disbursed money was specially raised, or that it came from a particular source, or that there had been a segregation of the proceeds of the school fund from the other school moneys in the hands of the

township board. It is a fair inference, as I read the testimony, that the school moneys, from whatever source, were mingled and that the litigated disbursements were made from the mingled moneys. Counsel for respondents under the writ, appellants here, brought out by examination of the clerk of the board that the school law provided for payment of transportation costs and that the board, on February 15, 1943, directed the payment of "a transportation bill" for the first half of the school year—the second half-yearly payment was withheld because of this litigation—in the amount of $8,034.95, and that included therein was the transportation of pupils to the Trenton High Schools, both junior and senior, and to the Trenton parochial schools. The machinery by which the proceeds of the state school fund and of the state school tax reaches the several school boards is as follows: The commissioner of education equitably apportions to the several counties the amount appropriated from the state school fund (R. S. 18:10-17) and the state comptroller thereupon draws (italics inserted) "his *warrant* on the state treasurer in favor of the county treasurer of each county for the portion of the income of the state school fund *and* of the state school tax to which the county is entitled" (R. S. 18:10-27) and the respective county treasurer pays the same to the custodian of the school moneys in the several school districts on the orders of the superintendent of schools of the county (R. S. 18:10-28); and the county superintendent is directed to apportion to the several school districts the state school moneys and the interest of the surplus revenue for various named purposes, among which is the meeting of seventy-five per centum of the cost of transportation of pupils (R. S. 18:10-41). I consider that with this statutory mingling of moneys devoted to school purposes and with the proof that the local board directed the payment of "a transportation bill"—the mental picture is of a consolidated figure disposed of as one item—of $8,034.94 for a half year's transportation of both public school and parochial school pupils the Supreme Court had sufficient upon which to support a finding that the amount was paid from mingled moneys, of which the proceeds from the state school fund were a part.

That finding is implicit in the Supreme Court decision. I accept it as supported by the record and therefore as binding upon us. It follows that the designated constitutional provision was violated. But the violation was not of that provision only.

Article 1, para. 19 provides:

> "No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become security for, or be directly or indirectly the owner of, any stock or bonds of any association or corporation."

Article 1, para. 20 provides:

> "No donation of land or appropriation of money shall be made by the state or any municipal corporation to or for the use of any society, association or corporation whatever."

Article 4, sec. 7, para. 11, provides:

> "The legislature shall not pass private, local or special laws in any of the following enumerated cases, that is to say: * * * Providing for the management and support of free public schools."

The conclusion, already reached, that the appropriation is in aid or support of the schools brings both the board resolution and the statute in conflict with para. 20. Our Supreme Court, our Chancery Court and our Court of Errors and Appeals have either expressed or adopted a view that necessarily leads to that result. In *Rutgers College vs. Morgan, Comptroller*, 70 N. J. L. 460, 474, Justice Van Syckel for the Supreme Court said of article 1, para. 20, and of the further provision relating to special laws: "They were designed as an insurmountable barrier to giving free state aid, and to donations to private or sectarian schools, and should be rigidly enforced; * * *." The opinion, with emendations that did not touch upon that expression, was adopted by the Court of Errors and Ap-

peals, 71 N. J. L. 663. Justice Van Syckel's language was quoted verbatim by Vice Chancellor Buchanan in deciding *In re Voorhees*, 123 N. J. Eq. 142, with this observation (page 146): "This determination was quite clearly approved by the Court of Errors and Appeals in *Morris and Essex Railroad Co.* v. *Mayor, &c., of Newark*, 76 N. J. Law 555, at 560, 70 Atl. Rep. 194". *In re Voorhees* was affirmed *sub Nom. Union County Trust Co. vs. Martin* by the Supreme Court, 121 N. J. L. 594, on the opinion of Vice Chancellor Buchanan and was further affirmed by the Court of Errors and Appeals, 124 N. J. L. 35.

Further, even if acceptance is to be given to appellants' theory that the appropriations are for the benefit of the children, article 1, para. 19 is violated by the resolution under review because that resolution contains no provision for the transportation of children generally. The authorized payment becomes a gift of money in aid of individuals. There is no provision for the transportation of children attending private or sectarian schools other than Catholic schools. Contrary to the statement of Chief Justice Hughes in *Cochran vs. Louisiana State Board, supra*, the resolution *does* segregate the schools and the pupils designated as beneficiaries. As has already been said, either the authority for this and every other provision of the resolution must be read into the statute or there is no authority for the resolution. Again, since the resolution is special as to those who are thus benefited by it and the arrangement is fitted into and integrated with the public school legislation, I consider that the constitutional prohibition against special legislation with respect to that system is violated, at least in spirit.

There is no compulsion upon parents in this state to send their children to a public school; but the public schools are open to every child and are attended by children of all religious faiths. The suggestion that, notwithstanding constitutional restraint, transportation may be furnished, at public expense, to such private or sectarian schools in another municipality as a parent or guardian may select, even though there are public school facilities within the district, is not, I think, supported by the statute. It will be recalled

that some of the children were transported to parochial elementary classes in Trenton although public schools of those grades were maintained in Ewing Township. The statute (R. S. 18:14-8) is not fairly susceptible of the construction that when a district board, owing to the lack of a local high school, arranges for the transportation of public school pupils to *high schools* in other centers, it may thereupon, likewise at public expense, transport children to the *elementary grades* of parochial schools located in those centers.

I hold district boards of education to be within the inhibitions placed by paragraphs 19 and 20, *supra*; upon municipalities and municipal corporations. *Cf. Landis vs. School District*, 57 N. J. L. 509, *State* v. *Deshler*, 25 N. J. L. 177, *Strock vs. East Orange*, 77 N. J. L. 382, *Trustees vs. Civil Service Commission*, 83 N. J. L. 196, 202, aff. 86 N. J. L. 307.

Article 1, para. 3 of our state constitution provides:

> "No person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately and voluntarily engaged to perform."

The operation of a church school under the direction of, and teaching the tenets of, a church, is a primary function whereby that church puts its impress upon and holds the children of the church to its faith. The parochial schools are a part of the ministration of the church under whose control they are. The ministry of the church is concerned and connected therewith. Specifically in this instance, a priest of the church is the superintendent. The schools are maintained by the parish and by moneys paid by the parents. They operate at a loss. Inasmuch as the disbursements

from public moneys are, according to the view taken above, in aid or support of the schools thus maintained and operated, and there is no dispute over the proposition that tax moneys are a part thereof, I come to the further conclusion that the resolution is in violation of article 1, para. 3, *supra*.

Both the resolution of the board and the statute upon which the resolution is rested are before us for review. In my opinion both are in violation of our constitution and the resolution exceeds the statutory authority.

For the reasons stated I vote to affirm the judgment below.

A True Copy, J. A. Brophy, Clerk.

(3412)

FILE COPY

MAR 4 1946
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 911 52

ARCH R. EVERSON,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET ALS.,

Appellees

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS

BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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Counsel for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 911

ARCH R. EVERSON,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET ALS.,

Appellees

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS

BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

I

We refer to appellant's Jurisdictional Statement for a fuller discussion of the points and authorities pertinent to argument in opposition to the Motion to Dismiss or Affirm.

II

In appellees' Statement as to Jurisdiction and Motion to Dismiss or Affirm it is stated (at page 11) as follows:

> "It is clear in the light of these rules that the Supreme Court of the United States, in denying the Writ of Certiorari, and in dismissing the appeal in the case of Gurney v. Ferguson, supra, (317 U. S. 588) was

> simply asserting that no substantial Federal question had been properly presented under the Fourteenth Amendment, * * *."

We respectfully submit that the inference drawn that the action of the Court in dismissing the appeal and denying certiorari was on the ground that the question involved was unsubstantial is not justified.

In the matter of the appeal, it was manifestly denied because appeal as of right is permitted only when the decision is in favor of the validity of the State statute and the decision of the Supreme Court of Oklahoma was against the validity of the State statute. This is made clear by the Court's reference to Section 344(a), Title 28, U. S. Code, as the reason for dismissal. Section 344(a) reads:

> "where there is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity, may be reviewed by the Supreme Court * * *."

As to the denial of the Writ of Certiorari, since the State Court held that the law violated the State constitution and this decision is conclusive and this Court has no power to review (*Haire* v. *Rice*, 204 U. S. 291, 301) the statute of the State would remain a nullity no matter what decision this Court should have rendered on the Federal constitutional question. So review of the decision below would have been futile so far as the statute of the particular state was concerned.

III

Both the appellant's and appellees' Statements as to Jurisdiction refer to the conflict of view in State decisions on the question of the constitutional validity of a statute authorizing the furnishing of free transportation to paro-

chial schools. This diversity of opinion among the highest courts of several states on the fundamental question involved and here presented, and the vigorous arguments in support of the opposing views, indicate very persuasively the importance, as well as the substantial character, of the constitutional question raised in this proceeding.

IV

Appellant respectfully submits that the Motion to Dismiss or Affirm should be denied.

Respectfully submitted,

EDWARD R. BURKE,
CHALLEN B. ELLIS,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

NO. 52.

ARCH R. EVERSON,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL.,

Appellees

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

BRIEF FOR APPELLANT

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SUBJECT INDEX.

	Page
Opinions of the Courts Below and Jurisdiction	1
Statement of the Case	2
Specification of Errors	5
Argument	6
Taxes Levied by a State must be for a Public Purpose and Aid, Direct or Indirect, to Private Sectarian Schools is for a Private, as Distinguished from a Public Purpose	6
The Payment out of Public Monies, Raised by Taxation for the Support of Free Public Schools, to Parents of Pupils of their Expenses of Sending their Children to Private Religious Schools, Constitutes a Division of School Funds between a Public Use and a Private and Religious Use Contrary to Fundamental Principles of the Federal Constitution	19
As to the Contention that such a Statute is in Aid of Enforcement of Compulsory Attendance Laws.	23

TABLE OF CASES CITED.

Bailey v. *Drexel Furniture Co.*, 259 U. S. 20	12
Board of Education v. *Barnette*, 319 U. S. 624	11, 22, 27
Cantwell v. *Connecticut*, 310 U. S. 296	11
Cochran v. *Board of Education*, 281 U. S. 370	11, 12, 13
Cole v. *LaGrange*, 113 U. S. 1	6, 10
Curtis v. *Whipple*, 24 Wis. 350	8
Everson v. *Board of Education*, 132 N. J. L. 98, 133 N. J. L. 350	2, 4, 14
Fallbrook Irrigation District v. *Bradley*, 164 U. S. 112	11
Green v. *Frazier*, 253 U. S. 233	11
Gurney v. *Ferguson*, 190 Okla. 254, 122 P. (2d) 1002; 317 U. S. 588, 317 U. S. 707	13, 18
Harfst v. *Hoegan*, 163 S. W. 2d 609	19
Jenkins v. *Andover*, 103 Mass. 74	9
Knowlton v. *Baumhover*, 182 Iowa 691, 166 N. W. 202, 5 A. L. R. 841	23

Page

Loan Association v. *Topeka*, 20 Wall, 655....6, 10, 16, 17, 20
Lowell v. *Boston*, 111 Mass. 454.....10, 20
Meyer v. *Nebraska*, 262 U. S. 390.....22, 25
Mitchell v. *Consolidated School Dist.*, 135 P. (2d) 79.. 13
Murdock v. *Pennsylvania*, 319 U. S. 105..... 11
Opinion of the Justices, 214 Mass. 599..... 14
Parkersburg v. *Brown*, 106 U. S. 487..... 10
People, ex rel v. *Board of Education*, 13 Barb. 400.... 14
Pierce v. *Society of Sisters*, 268 U. S. 510..... 26
Schneider v. *State*, 308 U. S. 147..... 25
Sherrard v. *Jefferson Co. Board of Education*, 294 Ky. 469..... 13
State ex rel Traub v. *Brown*, 36 Del. 181..... 13
Synod of Dakota v. *State*, 2 S. D. 366..... 14
Thompson v. *Consolidated Gas Co.*, 300 U. S. 55 — 11, 16, 17, 20, 25
Underwood v. *Wood*, 93 Ky. 177, 15 L. R. A. 825..... 22
Williams v. *Stanton Common School District*, 173 Ky. 708..... 14

STATUTES CITED.

Constitution of the United States, 1st Amendment 11, 13, 15, 19, 22, 26, 27
Constitution of the United States, 14th Amendment 2, 4, 5, 6, 11, 12, 13, 15, 22, 26, 27
Laws of 1941 of the State of New Jersey, Chapter 191, entitled "An Act relating to education, and amending Section 18:14-8 of the Revised Statutes"....2, 5, 6
Resolution of the Board of Education of the Township of Ewing of September 21, 1943..... 4
United States Code, Title 28, Section 344 (a)..... 1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

NO. 52.

ARCH R. EVERSON,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL.,

Appellees

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

BRIEF FOR APPELLANT

Opinions of the Courts Below and Jurisdiction

This case comes to this Court on appeal from the New Jersey Court of Errors and Appeals.

The jurisdiction of the Court is invoked under Section 344, Paragraph (a), Title 28, United States Code, providing:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being

repugnant to the Constitution, * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court. * * *"

The question raised in the Court below was as to the validity of a statute of the State, alleged to be violative of certain provisions of the Constitution of the State of New Jersey and the Fourteenth Amendment to the Constitution of the United States and the decision below was in favor of the validity of the statute. (R. 9, 45)

Judgment was rendered by the New Jersey Court of Errors and Appeals on November 8, 1945. (R. 62, 63) Appeal to this Court was allowed by the Chancellor and Presiding Judge of the New Jersey Court of Errors and Appeals on February 5, 1946. (R. 65)

The judgment referred to upheld the constitutionality of the resolution of the appellee Board of Education and the Act of the Legislature of the State of New Jersey, which resolution and statute had been duly attacked in the pleadings as being an infringement of the Fourteenth Amendment of the Constitution of the United States and of appellant's rights thereunder. (R. 45, 46, 9)

The opinion of the New Jersey Supreme Court is reported in 132 N. J. L. 98 and the opinion of the New Jersey Court of Errors and Appeals is reported in 133 N. J. L. 350. (R. 34, 46)

Statement of the Case

The New Jersey statute in question is Chapter 191, Laws of 1941 of the State of New Jersey entitled "An Act relating to education, and amending Section 18:14-8 of the Revised Statutes," which reads as follows:

"1. Section 18:14-8, of the Revised Statutes is amended to read as follows:

"18:14-8. Whenever in any district there are children living remote from *any* schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from

school, *including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.*

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.

"Nothing in this section shall be so construed as to prohibit a board of education from making contracts for the transportation of children to a school in an adjoining district when such children are transferred to the district by order of the county superintendent of schools, or when any children shall attend school in a district other than that in which they shall reside by virtue of an agreement made by the respective boards of education.

"2. This act shall take effect July first, one thousand nine hundred and forty-one."

The 1941 amendment (Chapter 191, Laws of 1941) changed the words "the schoolhouse" in the first paragraph of R. S. 18:14-8 to read "any schoolhouse," and the other parts of the statute italicized above were added by said amendment.

Action under the statute was taken by the School Board of Ewing Township by a resolution for the payment of transportation of certain pupils in that township to certain private parochial schools, part of which payment was made when suit was brought and part of which was unpaid, but was required to be paid by the resolution in question. (R. 8)

On application of the appellant, a resident and taxpayer of the Township of Ewing, the New Jersey Supreme Court issued a writ of certiorari to review the legality of a resolution adopted on September 21, 1942, (R. 1) which resolution provided: (R. 8, 13)

"The Transportation Committ. recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic Schools, by way of public carriers as in recent years. On Motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted."

Pursuant to the said resolution the appellee Board of Education agreed to pay for the then current school year the cost of transportation to such Catholic parochial schools approximately $859.80, and on February 15, 1943 authorized the payment of $8,034.95 for transportation, of which $357.74 was paid to the parents of pupils who were transported to such parochial schools. (R. 15, 18, 19, 35)

All of the said schools are Roman Catholic Parochial Schools in the City of Trenton, and religion is taught as part of the curriculum in each and every one of said schools. A priest of the Catholic Church is the Superintendent of said schools. (R. 23)

In the New Jersey Supreme Court appellant contended that the resolution and statute violated certain provisions of the State Constitution and the Fourteenth Amendment to the Constitution of the United States. (R. 9)

The New Jersey Supreme Court held (132 N. J. L. 98) that the resolution and statute violated certain provisions of the Constitution of New Jersey and entered judgment for this appellant setting aside the resolution. (R. 34-37)

The New Jersey Court of Errors and Appeals (133 N. J. L. 350) pointed out in its opinion that the record before it showed that the reasons advanced in the New Jersey Supreme Court and in the New Jersey Court of Errors and Appeals "in support of the judgment under review are that the statute, upon which the resolution is based, is infirm and inoperative because it contravenes several constitutional inhibitions, namely, Article I, paragraphs 3, 4, 19 and 20; Article IV, Section 7, paragraph 6, of the Constitution of this State, N. J. S. A.; and the Fourteenth Amendment to the Constitution of the United States," but held "that the legislature may appropriate general state funds or au-

thorize the use of local funds for the transportation of pupils to any school," and entered judgment reversing the judgment of the New Jersey Supreme Court. (R. 45-51)

Specification of Errors

1. The New Jersey Court of Errors and Appeals erred in reversing the judgment of the New Jersey Supreme Court setting aside the resolution of the Appellee Board of Education on the ground that said resolution authorizes an unconstitutional gift of public funds in aid of sectarian schools.

2. Said Court erred in refusing to sustain the holding of the New Jersey Supreme Court that Chapter 191, Laws of 1941 of the State of New Jersey, pursuant to which said resolution was adopted, is unconstitutional in that it authorizes the use of public funds for transportation of children to private and sectarian schools.

3. Said Court erred in refusing to hold that said resolution and statute violate the provisions of the Fourteenth Amendment to the Constitution of the United States in that they authorize aid to private and sectarian schools by taxation thus constituting a taking of private property for a private purpose.

4. Said Court erred in refusing to hold that said resolution and statute, even if not considered to be an aid to private or sectarian schools but an aid only to the children attending such schools, violate the Fourteenth Amendment to the Constitution of the United States in that it constitutes a taking of private property to aid private individuals.

5. Said Court erred in refusing to hold that said resolution and statute violate the Fourteenth Amendment to the Constitution of the United States in that they are legislation respecting the establishment of religion.

6. Said Court erred in refusing to hold that said resolution and statute violate the Fourteenth Amendment to the Constitution of the United States in that they constitute legislation authorizing the support of religious tenets by taxation.

7. Said Court erred in holding that Chapter 191, P. L. 1941 of New Jersey is a valid enactment and not in contravention of the 14th Amendment of the Constitution of the United States. (R. 64, 65)

ARGUMENT

Taxes Levied by a State must be for a Public Purpose and Aid, Direct or Indirect, to Private Sectarian Schools is for a Private, as Distinguished from a Public, Purpose.

The power of the state to tax, or to authorize taxation, under the Federal Constitution, is limited by the uses to which the proceeds may be devoted and one of the fundamental limitations is that the use must be a public one.

In *Cole* v. *LaGrange* 113 U. S. 1, 6, it is said:

> "The general grant of legislative power in the Constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes * * * These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject."

The view that public funds may not be used to give financial support or aid to private institutions of learning, not a part of the public school system, originated in the early decisions of this Court. In *Loan Association* v. *Topeka*, 20 Wall. 655, a leading case on the subject, it is said: (p. 664)

"We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not. * * *

"But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town. * * * In the case of *Lowell* v. *The City of Boston*, in the Supreme Judicial Court of Massachusetts * * *. The Court, in an able and exhaustive opinion, decided that the law was unconstitutional, as giving a right to tax for other than a public purpose.

"The same court had previously decided, in the case of *Jenkins* v. *Anderson* (Andover), 103 Mass 74, that a statute authorizing the town authorities to aid by taxation a school established by the will of a citizen, and governed by trustees selected by the will, was void because the school was not under the control of the town officers, and was not, therefore, a public purpose for which taxes could be levied on the inhabitants.

"The same principle precisely was decided by the State Court of Wisconsin in the case of *Curtis* v. *Whipple*, 24 Wis. 350. In that case a special statute which authorized the town to aid the Jefferson Liberal Institute was declared void because, though a school of learning, it was a private enterprise not under the control of the town authorities. In the subsequent case of *Whiting* v. *Fond du Lac*, already cited, the principle is fully considered and reaffirmed.

"These cases are clearly in point, and they assert a principle which meets our cordial approval."

In *Curtis* v. *Whipple*, 24 Wis. 350, one of the cases cited and approved, the Court was considering an act of the legislature authorizing the town of Jefferson to raise by tax $5,000, to aid in the erection of buildings for the "Jefferson Liberal Institute," in the town, in case the majority of the votes cast upon the question at a special town meeting should be in favor of the tax. The question was decided in the affirmative and Whipple, as town treasurer, proceeded to collect the tax. Curtis resisted the collection.

The court in holding the tax void said:

> "The counsel for the plaintiff correctly state the effect of the act of incorporation * * * when they say that the 'Jefferson Liberal Institute,' for the benefit of which the taxes in question were attempted to be assessed and collected, is essentially a private educational institution, controlled exclusively by the stockholders, through a board of trustees. The town of Jefferson is not a stockholder, and has no voice in its management. The taxpayers in the town, as such, are not stockholders, and have no privileges in the institute that are not common to all the people of this or any other state. The trustees may exclude any or all of the citizens of the town from the institution. * * * It strikes us, 'at the first blush,' that this is not the levy and collection of money for public purposes, as clearly as if the institute were not an incorporated body, but a mere association of private individuals resolved upon the establishment of a like institution. If it were such an institution, or a grammar or classical school, or a seminary built up and established by individual enterprise, as by persons engaged in the profession of teaching, or by others, and owned and controlled by those contributing toward it, and the emoluments belonging to them, we apprehend that no one would contend that the people of Jefferson might be taxed for the purpose of donating the money to it. The fact that it is an institution incorporated by act of the legislature does not change its character in this respect. * * * It can no more be supported by taxation than if it were unincorporated, or a private school or seminary of the kind above supposed. Nor will the location of the institu-

tion at Jefferson, and the incidental benefits which may thereby arise to the people of the town, sustain the tax. That is not the kind of public benefit and interest which will authorize a resort to the power of taxation."

Jenkins v. *Andover*, 103 Mass. 74 (another of the state cases cited and approved) was a suit to restrain the officers of the town of Andover from proceeding to raise money to aid in rebuilding Punchard Free School, a school founded by charitable bequest which vested the order and superintendence of it in trustees, who, though a majority of them were to be chosen by the inhabitants of the town, yet were limited to the members of certain religious societies. The court discussed the nature of public schools, saying:

"Schools which towns are required to maintain, or authorized to maintain, though not required to do so, as a part of our system of common education and which are open and free to all the children and youth of the towns in which they are situated, who are of proper age or qualifications to attend them, or which adjoining towns may unite to support as a part of the same system; * * *

"This class of school does not include private schools which are supported and managed by individuals; nor colleges or academies organized and maintained under special charters for promoting the higher branches of learning, and not specially intended for, nor limited to, the inhabitants of a particular locality. * * *

"But the school is not 'under the order and superintendence of the authorities of the town.' The will requires that it shall be under the direction of eight trustees; three of them to be clergymen of three of the religious societies in the town, and the other five, though chosen by the inhabitants in town meeting, to be members of those societies. All the other inhabitants of the town are ineligible to the office of trustee; and the authorities of the town, as such, have no control over the school. * * *

"* * * If a school can possibly exist which is not under the control of the town authorities, and yet can be called a common or public school within the meaning of the eighteenth article (state constitution) this is

such a school. The fact that it is not under the control of the town authorities is its objectionable feature, and constitutes the reason why moneys raised by taxation or appropriated by the Commonwealth for the support of common schools cannot be applied to its support."

In *Lowell* v. *Boston*, 111 Mass. 454, 460 (also cited and approved in *Loan Asso.* v. *Topeka, supra*) Justice Wells reviewed the general principles in cogent language, which "can hardly be surpassed for accuracy and clearness" (211 Mass. 624):

"The power to levy taxes is founded on the right, duty, and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the state, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.

"The principle of this distinction is fundamental."

The principles laid down in the case of *Loan Association* v. *Topeka* have never been denied in this Court, but on the contrary they have frequently been cited with approval. *Parkersburg* v. *Brown*, 106 U. S. 487; *Cole* v. *LaGrange*,

113 U. S. 1; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112; *Green* v. *Frazier*, 253 U. S. 233; *Thompson* v. *Consolidated Gas Co.* 300 U. S. 55, 80.

This view that the Fourteenth Amendment was violated by use of public funds for private schools was not denied but on the contrary was affirmed in the case of *Cochran* v. *Board of Education*, 281 U. S. 370, where it was recognized that the question under the Fourteenth Amendment of the Constitution of the United States was raised by an Act of the Legislature of Louisiana alleged to authorize aid to private schools in that State, but the decision held that the particular actions there involved did not constitute such aid.

It is also recognized in this Court that though the Fourteenth Amendment deals only with the taking of liberty or property without due process of law, yet the principles enunciated in the First Amendment, including the prohibition against any law respecting an establishment of religion or forbidding the free exercise thereof—constitute a chart by which due process of law may be measured, and that a violation of the First Amendment to the Constitution is a violation also of the Fourteenth Amendment. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 108; *Cantwell* v. *Connecticut*, 310 U. S. 296; see also *Board of Education* v. *Barnette*, 319 U. S. 624, 637, 639.[1]

With these preliminary questions disposed of by the decisions of this Court, we may come to the precise question in this case: May the state, consistently with the First and

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[1] In the case of *Board of Education* v. *Barnette*, it is said (at page 639)

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard."

Fourteenth Amendments, use funds raised by taxation, to furnish free transportation to pupils attending private parochial schools, not a part of the public school system of the state, and not under control of the state, but under control of a religious organization?

The right of the state to do so is generally put on one of three grounds:

1. That the furnishing of transportation is merely incidental to the broad policy of fostering education by the state, which is clearly a public purpose.

2. That the state in furnishing transportation to the pupils attending private schools is not aiding such schools but is merely aiding the children in securing education; and

3. That furnishing such free transportation is merely carrying out the authority of the state in having compulsory attendance of pupils at school, either public or private.

In presenting this argument the first thought to be considered is that it is not the extent of the "breach in the ark of our covenant"[2] that determines the validity of the statute questioned but whether there is really any breach at all.

It is clear that if we are to observe constitutional limitations we are called upon in every case to draw the line somewhere and if the particular instance falls over that line it is not to be ruled valid because it is just a little over the line. Where then is the line to be drawn in the particular field here discussed?

At the outset there occurs at once the question—was not the point settled and the question foreclosed by the decision in the *Cochran case?* (281 U. S. 370) We submit that an analysis of that case will show very clearly that this Court did not foreclose the questions here discussed.

The lower court had held:

1. That the school books furnished to the children were not sectarian books for use in religious schools but were

[2] *Bailey* v. *Drexel Furniture Co.* 259 U. S. 20.

in fact the public school books adopted and used in the public schools.

2. That the books were merely loaned to the pupils and were not given to them.

The analogy to furnishing public school text books to public libraries established and under control of the state and open to all the people with the right of any one to borrow the books for such length of time as the regulations permit—is inescapable. And so it was that Chief Justice Hughes in the *Cochran case, supra,* said, after reciting the limitations imposed upon the free school book statute by the Louisiana Supreme Court: "Viewing the statute as having *the effect thus attributed to it,* we cannot doubt that the taxing power of the State is asserted for a public purpose."

If the question is solely whether a state may purchase public school text books, retaining title to and control over them, and merely loaning them to the public (as public libraries do) making the books available to all alike, regardless of their religious creeds, there can be no doubt of the power of the state under the Fourteenth Amendment or the First Amendment to do so.

But the matter of furnishing financial aid either to the parochial schools or to the parents of the children attending such parochial schools, over which the state has no control and which are not a part of a free service open to all the people of the state or all the children of the state, presents a very different question.*

* It was apparently treated as a different question in the several state decisions (rendered since the decision in the *Cochran case*) holding invalid the furnishing of free transportation to private or parochial schools. *State ex rel Traub* v. *Brown*, 36 Del. 181 (1934); *Gurney* v. *Ferguson*, 190 Okla. 254 (1941); *Mitchell* v. *Consolidated School District*, 135 Pac. 2d 79 (1943); *Sherrard* v. *Jefferson County Board of Education*, 294 Ky. 469 (1943).

Such furnishing of free transportation is more nearly analogous to the use of public funds to pay directly or indirectly tuition fees of pupils in private or sectarian schools, which the state courts have

The question here presented is succinctly stated by Justice Case (now Chief Justice) in the dissenting opinion in the decision of the New Jersey Court of Errors and Appeals: (R. 51, 52, 53)

> "The issue is the constitutionality of reimbursement by the Board of Education of the Township of Ewing, from public moneys, to parents, resident in the township, for the bus fares paid by their children on public buses between the township and the City of Trenton, in which city the children attended certain Roman Catholic parochial schools. The religion of the church was taught in each of the schools as a part of the curriculum. A priest of the church was the superintendent of the schools. The resolution under review made no provision for transportation to private or sectarian schools other than Catholic schools and therefore did not make provision for children generally. Further, it made no change in the method of transportation and so added nothing to protection against traffic hazards. The transportation had been and continued to be by public buses running on their usual schedules. The township public schools extend through the eighth grade. Public school children beyond those elementary grades are transported either to Trenton or Pennington. Some of the parochial school children transported to Trenton were in the elementary grades and some in the high school grades. Consequently the parochial school children in the elementary grades were transported to the City of Trenton although the public school children in those grades were received and taught in the schools within the school district. * * *
>
> "A major question is whether the furnishing of transportation to private or parochial schools out of public money is in aid or support of such schools and whether constitutional provisions which prohibit such aid or support are violated by statutory authority for transportation. The argument that such disbursements are not in aid of the schools is based upon what is

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held invalid. *Williams* v. *Stanton Common School District*, 173 Ky. 708; *Synod of Dakota* v. *State*, 2 S. D. 366; *In re Opinion of the Justices*, 214 Mass. 599; *People, ex rel.* v. *Board of Education*, 13 Barb. 400.

known as the 'child-benefit' theory which presents as a distinction that the charges are for the benefit of the children rather than of the schools. * * *

"The 'child-benefit' argument is made here. Among its weaknesses, as a means of avoiding constitutional inhibitions, are its vagueness and the impossibility of satisfactorily distinguishing one item of expense from another in the long process of child education. * * *

"Every step in the educational process is, presumably, for the benefit of the child and, therefore, theoretically, for the benefit of the state. Consequently, if the argument is sound, it is within the discretion of the legislature, free of constitutional restraint, to provide for practically the entire cost of education in private and parochial as well as in public schools."

In all the cases where the principles of the First Amendment were involved, the question whether the restriction, regulation or aid was violative of constitutional limitations, was a narrow one, that is, the encroachment was slight and insignificant compared to the claimed general purpose of the law. In practically every case it might be said that the challenged law was for the general purpose of promoting education and helping the children of the state to secure it.

If the law here in question is sanctioned as not violating the Fourteenth Amendment or the First Amendment, because it has as its main purpose the promotion of education in the state and only incidentally and in a negligible way affects an establishment of religion or takes the property of the citizen for private purposes, then, with this as a precedent, what is to prevent the state from paying directly to the religious schools out of the public school funds or out of any funds raised by taxation sufficient money to secure the transportation of the students who desire to attend such schools? It might well be said that this would be a more convenient way to meet the situation and it could be said that it is for the state to decide the most convenient way to carry out its power. The payment to the children,

or to the parents, of bus fares to parochial schools, requires reports possibly from hundreds of individual children or parents, likewise proof and applications and numerous receipts and hundreds of exceedingly small disbursements. The whole matter could be handled by having the schools certify as to the number of children attending and in need of transportation and paying the money direct to the schools. It would follow logically from this that if the facilities of the private parochial schools were inadequate for reasons other than transportation, such schools might be helped financially, thus supposedly promoting education in the state and only incidentally affecting or relating to an establishment of religion.

In a recent decision (*Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55) this Court, in an opinion in which all the members of the Court joined, in passing upon the power of a state legislature under constitutional limitations of the Federal Constitution, reaffirmed the doctrine of *Loan Association* v. *Topeka, supra,* that the taking of the property of A and giving it to B is contrary to the fundamental principles of our form of government, even though the taking was related to or purportedly incidental to, a great public purpose—in that case the conservation of natural resources.

This Court also explained that the doctrine equally applied though the taking was not in the form of a regulation, but was of money raised by general taxation and given to private individuals or organizations.*

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* In *Thompson* v. *Consolidated Gas Co. supra,* at p. 79, Mr. Justice Brandeis, speaking for a unanimous court, said: "Our law reports present no more glaring instance of the taking of one man's property and giving it to another."

"In *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403; *Missouri Pacific Ry. Co.* v. *Nebraska*, 217 U. S. 196; *Great Northern Ry. Co.* v. *Minnesota*, 238 U. S. 340; *Great Northern Ry. Co.* v. *Cahill*, 253 U. S. 71; *Delaware L. & W. R. Co.* v. *Morristown*, 276 U. S. 182; and *Chicago St. P., M. & O. Ry. Co.* v. *Holmberg*, 282 U. S. 162, expenditures directed to be made for the benefit of a private person

In the case at bar, we have the simple fact that public funds, raised by taxation, were, under authority and direction of the State Legislature, handed over directly to A, B, C and D, private persons not in need, or requiring public charity, in amounts of cash required to pay the fare on means of transportation to private institutions, over which the public or the state had no control and in relation to which it could not exercise any control directly or indirectly, by the accepted doctrine of separation of church and state, except such as is inherent in sovereignty itself—the Police Power—to guard against or prevent epidemics, disease, fires, immorality, etc.

No fine distinctions as to reasonable classification of the subjects of state legislation; no argument as to minors being the wards of the state in the exercise of the police powers of the state; no extolling of the duty of the state to offer its own means of education to all the citizens; no theorizing as to subsidizing individuals to induce them to obey the laws as to compulsory obligations to their children—can gloss over this simple fact.

It never has been, and never can be, under our written constitution as it now stands, lawful or for the "public welfare" to take the property of A and give it to B. This Court has consistently so held from *Loan Association* v. *Topeka* to *Thompson* v. *Consolidated Gas Co.* and beyond.

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were held invalid, although the party ordered to pay was a common carrier. In *Loan Association* v. *Topeka*, 20 Wall, 655, and *Cole* v. *LaGrange*, 113 U. S. 1, the payments ordered for the benefit of a private person were declared invalid, although the money was to be raised by general taxation. In *Myles Salt Co.* v. *Board of Commissioners*, 239 U. S. 478, the exaction was held unlawful, though imposed under the guise of an assessment for alleged betterments. Compare *Georgia Railway & Electric Co.* v. *Decatur*, 295 U. S. 165. And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid. See *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 605, 606; *Rindge Co.* v. *County of Los Angeles*, 262 U. S. 700, 705. Compare *Cincinnati* v. *Vester*, 281 U. S. 439, 446, 449."

However desirable the law may seem to some, and however slight the infringement on our fundamental principles may be, the fact remains that this is a "glaring instance of the taking of one man's property and giving it to another."

And it is more important that this breach be closed when it occurs in the realm of separation of church and state and when it is, even though the degree be small, "respecting an establishment of religion."

In one of the very latest of the state cases on this subject, (*Gurney* v. *Ferguson*, 190 Okla. 254, 122 P. 2d 1002, which came to this Court on certiorari, which was denied in 317 U. S. 588 and 317 U. S. 707) the Supreme Court of Oklahoma said:

> "It is urged that the present legislative act (providing transportation to schools) does not result in the use of public funds for the benefit or support of this sectarian institution or school 'as such'; that such benefit as flows from these acts accrues to the benefit of the individual child or to a group of children as distinguished from the school as an organization. That argument is not impressive. * * * It is true this use of public money and property aids the child. We are convinced that this expenditure, in its broad and true sense, and as commonly understood, is an expenditure in furtherance of the constitutional duty or function of maintaining schools as organizations or institutions. The state has no authority to maintain a sectarian school. Surely the expenditure of public funds for the erection of school buildings, the purchasing and equipping and the upkeep of same; the payment of teachers, and for other proper related purposes is expenditure made for schools as such, Yet the same argument is equally applicable to those expenditures as to the present one.
>
> "If the cost of the school bus and the maintenance and operation thereof was not in aid of the public schools, then expenditures therefor out of the school funds would be unauthorized and illegal. Yet, we assume it is now acquiesced in by all that such expenditures are properly in aid of the public schools and are authorized and legal expenditures. If the maintenance

and operation of the bus and the transportation of pupils is in aid of the public schools, then it would seem necessarily to follow that when pupils of a parochial school are transported that such service would likewise be in aid of that school.

"In that connection we must not overlook the fact that if the Legislature may directly or indirectly aid or support sectarian or denominational schools with public funds, then it would be a short step forward at another session to increase such aid, and only another short step to some regulation and at least partial control of such schools by successive legislative enactment. From partial control to an effort at complete control might well be the expected development. * * *"

That *financial aid* to sectarian schools from public funds may well lead to efforts at *control* of such sectarian schools is not without examples in experience. (See *Harfst* v. *Hoegan*, 163 S. W. 2d, 609). Both are contrary to our conception of the absolute separation of church and state and to the principles enunciated in the Fourteenth Amendment as well as those in the First Amendment.

The Payment out of Public Monies, Raised by Taxation for the Support of Free Public Schools, to Parents of Pupils of their Expenses of Sending their Children to Private Religious Schools, Constitutes a Division of School Funds Between a Public Use and a Private and Religious Use Contrary to Fundamental Principles of the Federal Constitution.

The limits to which states may go in taking private property, though of somewhat wide range, are definitely confined by the Federal Constitution and the cases decided under it, to such taking as is for a *public use* only. While a public use, itself, embraces an increasing variety of things, because, doubtless, of our complex mode of living, yet the principles upon which a public use is determined have been unvaried throughout the cases. The requirements of a public use as deduced from these cases, are: the use must be

available to the public and there must be a capability of public use; the public must have or reserve some control over the use; some benefit must flow directly to the public from this use; the "promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object." (*Lowell* v. *Boston*, 111 Mass. 454, 461).

It may be difficult, in every case, to draw the line between what is, and what is not, a public use; but a line must be drawn somewhere or the limitations on the taxing power are meaningless and futile. But though hard to draw, there are some things that plainly and beyond doubt fall on one side or the other of the line. Among the uses which clearly fall on the private side, are those in which the public has neither control, as such, nor common and general access to or benefit from. Here is where this Court has drawn the line in *Loan Association* v. *Topeka, supra,* as plainly and unequivocally marked out. And here is the crux of this case.

Since that interpretation of the Constitution, there have been no changes of condition that make this interpretation inapplicable to the kind of case here presented. Private schools and religious schools have not changed their nature; public schools have tremendously grown and expanded and any supposed need to commit the education of the youth to private enterprises uncontrolled by the state because of the inability of the state to perform its functions, has diminished rather than increased. Therefore any thought that the Constitution is broad enough to meet the changing conditions of society has no application here. The principles announced in *Loan Association* v. *Topeka, supra,* are as sound and applicable, under present day conditions, as they were a hundred years ago. And this is recognized by this Court in the most recent decisions on the subject. (See *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55).

Without discussing the theories as to how far the state may go in entering businesses heretofore conducted by pri-

vate enterprise, or how far the state may go in aiding enterprises conducted by private individuals, but over which the state reserves and exercises control, at least to the extent of securing common and equal access and benefit on terms prescribed by the state—theories which are not before the Court in this proceeding—we present here the single question, whether a state having a common school system, controlled by the state, to which all children have access on terms prescribed by the state and to which all taxpayers have equal and common benefit, and supported by taxation upon all the citizens by a levy of general taxes, may divert any of the funds so raised, to the aid, support, or maintenance, in any form, by payments direct or to the users or patrons, of admittedly private enterprises offering common schooling of the grade offered by the public schools, where the entire control, at least to the extent of selecting those who may receive the benefit and have the access and prescribing the curriculum and the religious tenets to be observed, rests wholly in private hands and in a religious and sectarian organization, individual, association or corporation. To ask the question is to answer it, if taxation, under the Federal Constitution, in all the states, must be confined to a "public use," as that expression is and always has been understood since the adoption of the Constitution, and if the absolute separation of church and state, fundamental in our form of government, is to be maintained.

In dividing the school fund between the public schools, over which the public has control, and the parochial schools, over which the public does not have control, it is plainly not important—so far as the constitutional question is concerned—whether the division is effected by payments direct to the parochial schools or by payments to the pupils attending such private schools, or to the parents of such pupils.

If so dividing the public funds for the support of public schools is to be sanctioned, it will set "a precedent that must, if followed, destroy the very existence of common

schools." (*Underwood* v. *Wood*, 93 Ky. 177, 15 L. R. A. 825).

If dividing the school fund is improper, it does not become valid because it tends to promote or is in aid of some other policy of the state. (*Board of Education* v. *Barnette*, 319 U. S. 624; *Meyer* v. *Nebraska*, 262 U. S. 390) The same argument as to aid to other state policies, could be made for establishing outright and maintaining completely the parochial schools. But there is general agreement that this may not be done under our form of government.

"Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise" * * * Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction." (*Board of Education* v. *Barnette, supra*)

As the freedoms of the First Amendment are to be imported into the Fourteenth, the Constitution of the United States requires that religious liberty shall be the rule in the states; but there is not to be implied from this that the Constitution either requires or permits the exercise of or choice in the exercise of religious liberty to be subsidized by the state. Such implication would impair the outstanding characteristic of religious liberty—the separation of church and state.

And yet that is precisely the nature of the payments here made. The payments out of public funds are not because the parents are in need of charity; nor is it contended that the parents cannot give full sway to their religious beliefs or send their children to religious schools unless this money is paid to them; nor is it suggested that the recipients are in any way discriminated against and that this subsidy is some recompense for that discrimination. The money is paid solely and only because the parents voluntarily elect to send their children to parochial schools instead of to the public schools. The election is theirs, not the state's, and is in no way imposed or induced by the state. There is

logically no limit to the election, though it embrace all the children in the district and make the public schools idle and useless. Nor is there any limit, in principle, to the method by which the subsidy is to be effected by depletion of the public school funds for the use of those who happen to have objections on religious grounds to the public schools, or prefer, from mere whim, the private or parochial school to the public school supported by taxation of all the citizens and for which alone the taxes were levied and the school fund accumulated.

As to the Contention that such a Statute is in Aid of Enforcement of Compulsory Attendance Laws.

The argument that paying parents to send their children to private schools facilitates enforcement of "compulsory education laws" is no justification for violation of specific constitutional limitations.

The constitutional limitations, so far as they apply to the states, are restrictions on the states as to specific matters and acts.

They are not operative in those states only which do not have certain other valid laws to be enforced and inoperative in those states which do have such other laws.

The separation of church and state and the restrictions on the use of public funds are fundamental and vital principles. They are not to be encroached upon to further the convenience of the state in enforcing its legitimate prohibitions or mandates.

The cogent reasoning of the Supreme Court of Iowa, in *Knowlton* v. *Baumhover*, (1918), 182 Iowa 691, 166 N. W. 202, 5 A. L. R. 841, is apt and pertinent here. That court says:

> "If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state, and that our public school system, supported by the taxation of the property of all alike—

Catholic, Protestant, Jew, Gentile, believer, and infidel—shall not be used directly or indirectly for religious instruction, and above all that it shall not be made an instrumentality of proselyting influence in favor of any religious organization, sect, creed, or belief.

"* * * We can and do hold in high respect the convictions of those who believe it desirable that secular and religious instruction should go hand in hand, and that the school which combines mental and spiritual training is best adapted to the proper development of character in the young. The loyalty to their professed principles which leads such persons to found and maintain schools of this class at their private expense, while at the same time bearing their equal burden of taxation for the support of public schools, is worthy of admiration and convincing proof of their sincerity. But it is doubtless true that this double burden (double only because voluntarily assumed) sometimes renders those who bear it susceptible to the misleading argument that because they thus carry an extra load for conscience's sake, there is something wrong in the policy which forbids them to make the public school a means for accomplishing the end for which the parochial school is designed. * * *But, as we have before intimated, the right of a controversy of this kind is not to be decided by a count of the number of adherents on either side. The law and one are a majority, and must be allowed to prevail. The spirit which would make the state sponsor for any form of religion or worship, and the religion, whether Protestant or Catholic, which would *make use of any of the powers or functions of the state to promote its own growth or influence,* are un-American; they are not native to the soil; they are inconsistent with the equality of right and privilege and the freedom of conscience which are essential to the existence of a true democracy." (Italics supplied)

There are many instances where the payment of money to some individuals might well prevent or lessen evasions of the law or aid in the enforcement of the law. But it can never be in the public interest to take one private individual's property and hand it over to another private individual.

In the interests of conservation of natural resources the state may limit and prorate the production of oil or gas; but that does not mean that the state may require A to purchase oil or gas from B, or B to sell to A. (*Thompson* v. *Consolidated Gas Co., supra*)

A city may pass ordinances against littering the streets, but it cannot forbid the distribution of religious pamphlets because such distribution may tend to hamper the enforcement of such ordinances. (*Schneider* v. *State*, 308 U. S. 147, 161) But how absurd to say that, as a corollary to this, the city must not only permit such distribution but may compel the inhabitants of the city, through taxation, to pay the fare of those doing the distributing!

The state may, in the interest of the effectiveness of compulsory education in some school, public or private, require the teaching of English in all schools, but it may not deprive teachers of other languages of their right to exercise a lawful calling or deprive parents of their right to have their children receive such instruction, if they choose. (*Meyer* v. *Nebraska* 262 U. S. 390) But the exercise of the choice is obviously to be at their own expense; there is not implied in such right, that the state may compel the public, through taxation, to secure, or contribute to securing, such teaching of other languages.

The theory of compulsory education laws is that it is the duty of parents to educate their children, and the state, in furtherance of its own interests, may compel the performance of this duty. There is a corresponding duty of the state to furnish facilities of free schools to all so that the obligation of the parents may be fulfilled without undue burdens and without discrimination because of financial conditions. The underlying thought back of such legislation is the furnishing of facilities of every kind for the *public school* free to all, and to which all may have access without expense. The sending of children to private schools, whether religious or nonsectarian, is an excuse for not utilizing the public facilities afforded by the state—an excuse which must be accepted, otherwise there would be an

interference with religious freedom and the pursuit of the lawful calling of teaching in private schools. (*Pierce* v. *Society of Sisters*, 268 U. S. 510) The exemption thus afforded is because the parents are ready, willing and able to send their children to private schools and to the particular school of their own choice.

The public schools do not trench upon the tenets of any religion. Indeed they cannot do so under our constitution. There is no reason why children should not attend the public school nor any reason why they should not be compelled so to attend except their freedom of choice in the matter of religion which extends to schools in connection with religion. But to say that the parents may not only be excused from sending their children to the public schools but shall be paid for exercising this choice is extending religious liberty beyond anything heretofore suggested and runs counter to the mandate of the separation of church and state, inherent in the First Amendment providing that there shall be no law respecting an establishment of religion and to the mandate inherent in the Fourteenth Amendment that the funds raised by taxation shall be devoted wholly to a public use and not to a private use.

There is no challenge here of the validity or propriety of Compulsory Education Laws, where there are adequate facilities for public education furnished by the state and proper exceptions and exemptions. What is challenged is the right of the state to subsidize those who claim the exemption or exception, by paying out of public funds part or all of their expenses in exercising such free choice, particularly where the choice is on religious grounds and the payment is solely because of their claimed religious beliefs.

Subject only to the right of the state to protect itself—by proper exercise of the Police Power—the freedom of the individual consistent with like freedom of other individuals in the body politic means "non-action" by the state in the particular instance where the freedom is secured; it does not mean that the rest of the public, in the discretion of the legislature or a local board, may be compelled, through

taxation, to pay money to the citizen, in any way or to any extent, to exercise his freedom. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Board of Education* v. *Barnette, supra,* at p. 638.

Providing for such compulsory payment is not "separation of church and state" meant by the First Amendment; it is not the "due process" meant by the Fourteenth Amendment; on the contrary it is violative of both amendments.

Respectfully submitted,

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MAR 4 1946
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 911

ARCH R. EVERSON,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

WILLIAM ABBOTTS,
Counsel for Appellees.

WILLIAM H. SPEER,
Of Counsel.

INDEX

Subject Index

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1
Facts	2
Argument	3

Table of Cases Cited

Adams v. *County Commisioners*, 26 Atl. (2d) 137	14
Board of Education v. *Wheat*, 174 Md. 314, 199 Atl. 628	14
Board of Revenue v. *Puckett*, 149 So. 850	10
Borden v. *Louisiana State Board of Education*, 168 La. 1005, 123 So. 655	14
Bourgois, Inc. v. *Chapman*, 301 U. S. 183	26
Bradfield v. *Roberts*, 175 U. S. 291	27
Carley & Hamilton v. *Snook*, 281 U. S. 71	10
Chance v. *Mississippi Textbook R. & F. Board*, 190 Miss. 453, 200 So. 706	14
Citizens Savings and Loan Assoc. v. *Topeka*, 20 Wall. 655	8
City of Allegan, Mich. v. *Consumers Power Co.*, 71 F. (2d) 477, 293 U. S. 586	26
Cochran v. *Louisana State Board of Education*, 168 La. 1030, 122 So. 664, 281 U. S. 370, 74 L. Ed. 913,	4, 11, 14
Cole v. *LaGrange*, 113 U. S. 8	7
Curtis v. *Whipple*, 24 Wis. 350	8
Davidson v. *New Orleans*, 96 U. S. 97	7
Dunn v. *Chicago Industrial School*, 280 Ill. 613, 117 N. E. 735	27
Fallbrook Irrigation District v. *Bradley*, 164 U. S. 112	7
Green v. *Frazier*, 253 U. S. 233	6, 8, 9
Gurney v. *Ferguson*, 190 Okla. 254, 122 P. (2d) 1002, 317 U. S. 588	9

	Page
Heald v. *District of Columbia*, 259 U. S. 114	26
Hunt v. *Lamberville*, 45 N. J. L. 279	26
International Harvester Co. v. *Missouri*, 234 U. S. 199, 34 S. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525	14
Interstate Cons. Street R. Co. v. *Massachusetts*, 207 U. S. 79	11
Jenkins v. *Anderson*, 103 Mass. 94	8
John A. Gebelein, Inc. v. *Milbourne*, 12 F. Supp. 105	10
Judd v. *Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576	20
Mitchell v. *Consolidated School District*, No. 201, 135 P. (2d) 79	20
Mobile County v. *Kimball*, 102 U. S. 691	7
Nashville, C. & St. L. Ry. v. *Wallace*, 288 U. S. 268	10
Nichols v. *School Directors*, 93 Ill. 61, 34 Am. Rep. 160	27
Opinions of Attorney General, 1936, p. 415	13
Payne v. *Jones*, 199 N. W. 472	10
Peak v. *Court of Internal Revenue*, 80 F. (2d) 761, 298 U. S. 666	26
Pierce v. *Society of Sisters of the Holy Name of Jesus and Mary*, 268 U. S. 510	16, 26
Savings and Loan Association v. *Topeka*, 20 Wall. 655	8
Scott v. *Frazier*, 253 U. S. 233	10
Sherrard v. *Jefferson County Board of Education*, 294 Ky. 469, 171 S. W. (2d) 963	20
Sproles v. *Binford*, 286 U. S. 374	11
State v. *Bayonne*, 35 N. J. L. 335	26
State, ex Rel. Traut v. *Brown*, 36 Del. 181, 172 A. 835	20, 24
State, ex Rel. Van Straten v. *Milquest*, 180 Wis. 190, 192 N. W. 392	20
Stephens v. *Bangert*, 15 N. J. Misc. R. 80, 189 All. Rep. 131	18
Stemmel v. *Madison Brought*, 82 N. J. L. 62	26
Thomas v. *Gay*, 169 U. S. 264	10
U. S. v. *Butler*, 296 U. S. 561, 297 U. S. 1	9

STATUTES CITED

	Page
Constitution of New Jersey, Article IV, Section 7, par. 6	18
Constitution of the United States, 14th Amendment	3, 7
Corpus Juris, Volume 16, Sec. 100, p. 285	10
Illinois Revised Statutes, 1935, Ch. 122, par. 128	12
Indiana (Sch. Laws 1935, Ch. II, Sec. 2)	12
Iowa (1935 Code, Sec. 4179)	13
Kansas (Sch. Laws 1939, Sec. 72-4107a)	12, 13
Kentucky (Com. Sch. Laws 1940, Secs. 4339-4420)	13
Massachusetts (Gen. Sch. Law, Ch. 40, Sec. 5)	13
Michigan (Comp. Laws, 1939, Secs. 7379, 7439, as amended)	13
Missouri (Sess. Acts 1939, No. 448, Secs. 1, 2)	13
New Hampshire (Pub. Ed. Laws 1937, Ch. 117, Sec. 7a)	13
New Jersey (Pub. Laws 1941, Ch. 191)	13
New Mexico (Laws 1933, Ch. 112, Sec. 5)	12
Oregon:	
(Laws 1941, Ch. 485, Sec. 1)	12
(Laws 1939, Ch. 352)	13
Revised Statutes of New Jersey:	
Section 18:3-18	19
Section 18:7-57	25
Section 18:14-14	18
Section 18:14-34	19
Section 18:14-35	19
Section 18:19-1	19
Section 18:19-4	19
Section 18:19-7	19
Section 18:19-8	19
Section 18:20-18	19
Section 54:4-3.6	27
Rhode Island (Gen. Laws 1938, Ch. 178, Sec. 31)	13
West Virginia (Sch. Laws 1939, Ch. 18, Art. 5, Secs. 13, 21-b)	12
Wisconsin (Pub. Ed. Laws of Wisc., Secs. 34, 40)	13

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 911

ARCH R. EVERSON,

Prosecutor, Appellee,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL.

Respondents-Appellants.

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Appellees' Statement as to Jurisdiction and Motion to Dismiss or Affirm

The Appellees, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, file this, their statement in opposition to appellant's statement as to jurisdiction. Appellees include herein their motion to dismiss the appeal or in the alternative to affirm the judgment of the New Jersey Court

of Errors and Appeals on the grounds that the questions raised on behalf of Appellant are so insubstantial as not to need further argument, and indeed that the Statement of Jurisdiction filed by Appellant shows them so to be.

While the cause is one which otherwise would be reviewable by the Supreme Court on direct appeal from the New Jersey Court of Errors and Appeals, Appellees assert that the insubstantial character of the grounds stated by Appellant are so apparent on the face of the record as to warrant the court in summarily disposing of the appeal at this stage of proceeding. Appellees also show that the judgment of the New Jersey Court of Errors and Appeals must in any event be affirmed upon the findings of the said court.

The matters here relied upon by Appellees are more particularly stated below:

Facts

The evidence in the case shows, and all that it shows, is that Arch Everson, the Appellant, testifies that he owns his home in the Township of Ewing and pays taxes on that property to the Township of Ewing. Charles Garfield Latham, the District Clerk, testifies that the resolution in question reads as follows:

"The Transportation Committee recommended the transportation of pupils of Ewing to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier as in recent years. On motion of Mr. Ralph Ryan and Mr. M. French, the same was adopted."

He further testified as follows:

Q. "Mr. Latham, after the adoption of this resolution, were certain applications received from parents of children who desired to send their children from the Township to certain Parochial schools in the City of Trenton?"

A. "Yes, I say yes to that. The applications were made, and they were carried on renewal each year."

He further testified:

Q. "Was there any transportation of pupils from Ewing Township to schools other than the Parochial schools involved?"

A. "Trenton High Schools, both Junior and Senior."

Father Endebrock testified that he was Superintendent of the Parochial schools throughout the Diocese of Trenton, which includes the City of Trenton, and that religion is taught as part of curricula therein, and that these schools are not conducted in whole or in part for profit, and that the only money taken in is what is paid by the parents or the parish for the maintenance of the school, but that they all operate at a loss.

Argument

Under the guise of stating many points in antagonism to the statute and resolution challenged, Appellant in reality only poses one fundamental objection and that is that the furnishing of transportation to pupils, residing at a distance from private and sectarian schools at the public expense, constituted an unconstitutional gift of public funds, or an unconstitutional use thereof, so as to constitute a taking of private property for a private purpose, in that it was an aid to either the sectarian schools or an aid to the children attending the same, in violation of the Fourteenth Amendment to the Constitution of the United States. It is also assigned for error that the resolution and statute violate the Fourteenth Amendment in that they constitute legislation authorizing the support of religious tenets by taxation.

There is no substantial ground for any of these contentions which constitute all those contained in the Assignment of Errors, and argued in The Statement of Jurisdiction.

The whole bases of Appellant's said contention are completely disposed of in principle by the decision of the United States Supreme Court in *Cochran* v. *Board of Education*, 281 U. S. 370.

The opinion of Chief Justice Hughes, speaking for a unanimous United States Supreme Court, in that case which was one involving the use of money raised by taxation to purchase school books free of cost to all school children of the State, including those attending sectarian schools, notwithstanding constitutional provisions at least as stringent as those in New Jersey, is conclusive, and hence we quote, in order to make this Brief self-contained and its continuity unbroken in this particular, a large portion of the short opinion:

"The contention of the appellant under the Fourteenth Amendment is that taxation for the purchase of school books constituted a taking of private property for a private purpose. *Loan Association* v. *Topeka*, 20 Wall. 655. The purpose is said to be to aid private, religious, sectarian and other schools not embraced in the public educational system of the State by furnishing textbooks free to the children attending such private schools. The operation and effect of the legislation in question were described by the Supreme Court of the State as follows (168 La., p. 1020):

" 'One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their

benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children. * * * What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected, adapted to religious instruction.'

"The Court also stated, although the point is not of importance in relation to the Federal question, that it was 'only the use of books that is granted to the children, or, in other words, the books are lent to them.'

"Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the State is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

It is said in *Green* v. *Frazier*, 253 U. S. 233, cited by Appellant in his Statement of Jurisdiction:

"The taxing power of the States is primarily vested in their legislatures, deriving their authority from the people. When a state legislature acts within the scope of its authority it is responsible to the people, and their right to change the agents to whom they have entrusted the power is ordinarily deemed a sufficient check upon its abuse. When the constituted authority of the State undertakes to exert the taxing power, and the question of validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.

"What is a public purpose has given rise to no little judicial consideration. Courts, as a rule, have attempted no judicial definition of a 'public' as distinguished from a 'private' purpose, but have left each case to be determined by its own peculiar circumstances. Gray, Limitations of Taxing Power, Section 176, 'Necessity alone is not the test by which the limits of State authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people.' Cooley, Justice, in *People* v. *Salem*, 20 Michigan, 452. Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government. *Chicago, Burlington & Quincy R. R. Co.*

v. *McGuire*, 219 U. S. 549, 569; *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389.

"With the wisdom of such legislation, and the soundness of the economic policy involved, we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire."

Appellant under Point 3 of his "Statement of Jurisdiction" lays the main stress of his entire statement on certain cases which he thinks support his contention that the instant case runs afoul of the principle that "The action of a state in levying taxes for a private, as distinguished from a public, purpose, raises a constitutional question under the Fourteenth Amendment to the Constitution of the United States." Of course, there can be no quarrel with the prinicple, but it has no inimical application whatever to the instant case, nor does any one of the cases cited establish that it has; while the case of *Cochran* v. *Louisiana State Board of Education, supra*, demonstrates that it has not. In *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, the first case cited by Appellant under "Point 3," it is said "What is a public use, for which private property may be taken by due process of law, depends upon the particular facts and circumstances connected with the particular subject matter." The limitations of the application of the Fourteenth Amendment to State legislation are cogently stated on pp. 155 and 157, *inter alia*, of the opinion in the *Fallbrook* case; and *Davidson* v. *New Orleans*, 96 U. S. 97, 104, is cited with approval for a principle, pp. 157 bottom and 158 top, which militates strongly against Appellant's contention, as is *Mobile County v. Kimball*, 102 U. S. 691, 704.

In *Cole* v. *LaGrange*, 113 U. S. 8, the admitted facts were that the LaGrange Iron and Steel Company, to which the

bonds were issued, was "A private manufacturing company, formed and established for the purpose of carrying on and operating a rolling mill," and "Was strictly a private enterprise, formed and prosecuted for the purpose of private gain, and which had nothing whatever of a public character."

The *Topeka* case was that of a private company for private gain, with nothing whatever of a public character, engaged in the manufacture of iron bridges. The *Parkersburg* case was one of a loan of the City's bonds for the purpose of aiding this private, profit-making company "in the erection of a foundry and machine works."

The cases of *Jenkins* v. *Anderson*, 103 Mass. 94, which simply involved the question of the violation of a state constitution and lack of power, and *Curtis* v. *Whipple*, 24 Wis. 350, both cited with approval in *Savings and Loan Association* v. *Topeka*, 20 Wall. 655, are not in the least in point. *Cole* v. *LaGrange* and *Parkersburg* v. *Brown* are completely differentiated and shown to be inapplicable to the instant controversy by the case of *Green* v. *Frazier*, 253 U. S. 233, cited by Appellant in connection with the above cases in its Statement of Jurisdiction herein, wherein it is said (p. 242), "This is not a case of undertaking to aid private institutions by public taxation as was the fact in *Citizens Savings and Loan Association* v. *Topeka*, 20 Wall. 655, 665." It is sufficient to say that *Parkersburg* v. *Brown*, *Cole* v. *LaGrange*, and *Savings and Loan Association* v. *Topeka*, all *supra*, were all cases condemning the issuance of bonds to directly assist merchants or manufacturers in their private businesses, carried on for profit.

The instant case is one to use the language of Mr. Chief Justice Hughes in *Cochran* v. *Board of Education*, *supra*, "Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the State

is exerted for a public purpose. The legislation does not segregate private schools, or their pupils as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly, its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

Next under points 3 *et seq.* of the Statement of Jurisdiction is cited a collection of cases, all decided in State Courts, which hold that furnishing free transportation to pupils attending sectarian or private schools is done to aid the schools. Only one of these cases, *Gurney* v. *Ferguson*, 190 Okla. 254, 122 P. 2d, 1002, was taken to the Supreme Court of the United States. This case appears in 317 U. S. 588 in the following memorandum:

"No. 128.—*Gurney et al.* v. *Ferguson et al.* Appeal from the Supreme Court of Oklahoma. October 12, 1942. Per Curiam: The appeal is dismissed for want of jurisdiction. Sec. 237(a), Judicial Code, as amended, 28 U. S. C. Sec. 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by Sec. 237(c) of the Judicial Code as amended, 28 U. S. C. Sec. 344(c), certiorari is denied. Messrs. W. P. Wilson, M. A. Ned Looney, and T. Austin Cavin for appellants. Reported below: 190 Okla. 254, 122 P. 2d 1002."

Rehearing Denied, 317 U. S. 707.

"Having in mind the general rules of construction of statutes in respect to their constitutionality that "The presumption in favor of constitutionality is especially strong in the case of statutes enacted to promote a public purpose, such as, for example, statutes relating to taxation. 16 CJS, Sec. 99, P. 275; *Green* v. *Frazier*, 253 U. S. 233; *U. S.* v. *Butler*, 296 U. S. 561, 297 U. S. 1.

"In considering the constitutionality of a statute enacted in exercise of the power to levy taxes for the general welfare, it is strongly presumed that the tax is being levied for a public purpose, and that the legislature's determination of what constitutes a public purpose is correct." 16 CJS Sec. 100, P. 285; *John A. Gebelein, Inc.* v. *Milbourne*, 12 F. Supp. 105; *Scott* v. *Frazier*, 253 U. S. 233, 243. "Any question as to whether an appropriation of public revenues is for a public purpose must be resolved in favor of the validity of the statute." *Payne* v. *Jones*, 199 N. W. 472; *Board of Revenue* v. *Puckett*, 149 So. 850.

"Where the public benefit is direct, incidental advantage to individuals or a class does not defeat a tax." *John A. Gebelein, Inc.* v. *Milbourne*, 12 F. Supp. 105; *Scott* v. *Frazier*, 253 U. S. 233, 243; *Thomas* v. *Gay*, 169 U. S. 264, 280.

"Where the court used the following language:

"It is no objection to a tax that the party required to pay it derives no benefit from the particular burthen; e.g., a tax for school purposes levied upon a manufacturing corporation. But, in truth, benefits always flow from the appropriation of public moneys to such purposes, which corporations in common with natural persons receive in the additional security to their property and profits. *Amesbury Nail Factory Co.* v. *Weed*, 17 Mass. 53."

See the same point stated in *Carley & Hamilton* v. *Snook*, 281 U. S. 71. See also, *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 268.

"Appellant objects that the tax violates the Fourteenth Amendment in that it is levied as a charge for the use of the highways which Appellant does not use. But the levy is a tax, not a toll or charge for the use of the highways, see *Corley & Hamilton* v. *Snook*, 281 U. S. 66, and the consti-

tutional power to levy taxes does not depend upon the enjoyment by the taxpayer of any special benefit from the use of the funds raised by taxation."

It is clear in the light of these rules that the Supreme Court of the United States, in denying the Writ of Certiorari, and in dismissing the appeal in the case of *Gurney* v. *Ferguson, supra,* was simply asserting that no substantial Federal question had been properly presented under the Fourteenth Amendment, and applying the well-settled doctrine that the challenged statute was passed in the exercise of the Police Power, and that that power extends to regulations relating to education, *Interstate Cons. Street R. Co.* v. *Massachusetts,* 207 U. S. 79, and that debatable questions as to reasonableness are not for the courts but for the legislature, *Sproles* v. *Binford,* 286 U. S. 374, and that what constitutes a public purpose might well be decided by one State in one way and by another State in another, and that this question has been variously decided in the different States of the union, and the Supreme Court of the United States has implicitly in one and expressly in another sustained the contrary conceptions of public purpose embodied in such decisions. I refer, of course, to the case of *Gurney* v. *Ferguson, supra,* and *Cochran* v. *Louisiana State Board of Education,* 281 U. S. 370. In other words the Courts of some States might condemn legislation treating free transportation of pupils and furnishing free textbooks to them as being primarily an aid to the schools, and other States might equally legitimately treat such transportation and furnishing of textbooks as primarily for the benefit of the State and the promotion of the education of its citizens. The reasonableness and non-arbitrary character of the challenged legislation will be made crystal clear by the following tabulation of its general legislative acceptance and utilization.

As part of contemporaneous history, it should be pointed out that many states (other than those in which litigation has arisen) have statutes which extend free transportation and/or textbook privileges to "Private" school pupils, and find no constitutional objection to such statutes. Moreover, the Attorneys General of several such states have rendered opinions upholding the constitutional validity of such statutes.

To round out the picture, it is well to point out that in addition to the states in which litigation has arisen, as a result of the extension of free transportation and/or free textbook privileges to pupils attending "Private" schools, there are many states in which similar legislation has been enacted and is being carried out without objection to its constitutional validity, notwithstanding that the constitutional provisions of these states are similar to those of New Jersey, which have been invoked by the plaintiff in the present case. In addition to the states hereinafter listed, there may be other states having like legislation. In the limited time at our disposal, we have not been able to complete the research necessary to determine whether there are other such states.

We next list the states (other than those in which litigation has arisen) which extend free textbook privileges to pupils of private schools. They are in alphabetical order:

1. Kansas (Sch. Laws 1939, Sec. 72-4107-a);
2. New Mexico (Laws 1933, Ch. 112, Sec. 5);
3. Oregon (Laws 1941, Ch. 485, Sec. 1);
4. West Virginia (Sch. Laws 1939, Ch. 18, Art. 5, Sec. 21-b).

Similarly, the following states, listed in alphabetical order, extend free transportation privileges to pupils of private schools:

1. Illinois (Rev. Stats. 1935, Ch. 122, Par. 128);
2. Indiana (Sch. Laws 1935, Ch. II, Sec. 2);

3. Iowa (1935 Code, Sec. 4179);
4. Kansas (Sch. Laws 1939, Sec. 968);
5. Kentucky (Com. Sch. Laws 1940, Secs. 4339-4420);
6. Massachusetts (Gen. Sch. Law, Ch. 40, Sec. 5);
7. Michigan (Comp. Laws 1939, Secs. 7379, 7439, as amended);
8. Missouri (Sess. Acts 1939, No. 448, Secs. 1, 2);
9. New Hampshire (Pub. Ed. Laws 1937, Ch. 117, Sec. 7(a));
10. New Jersey (Pub. Laws 1941, Ch. 191);
11. Oregon (Laws 1939, Ch. 352);
12. Rhode Island (Gen. Laws 1938, Ch. 178, Sec. 31).

In West Virginia and Wisconsin, the law provides for the free transportation of "all children of school age" (Sch. Law W. Va. 1939, Ch. 18, Art. 5, Sec. 13; Pub. Ed. Laws of Wisc., Secs. 34, 40).

In Iowa, Illinois, and Massachusetts, the constitutionality of legislation extending free transportation privileges to pupils attending "Private" schools has been passed upon by the Attorneys General of said respective states, and the constitutionality of the legislation has been upheld in the face of constitutional objections similar to those made in instant case. The opinion of the Attorney General of Iowa is dated July 14, 1936. The opinion of the Attorney General of Illinois was rendered in 1936 (see Opinions of Attorneys General 1936, p. 415). There are two opinions by the Attorney General of Massachusetts, dated February 17, 1936, and December 23, 1936, respectively.

In the cases cited therefor in Appellants brief the courts have held that similar legislation was unconstitutional on the theory that it made a "gift" or "grant" of public property or otherwise lent "support" to a "sectarian" or other private school. In short, in the cases there cited, the courts held that the private schools and not their pupils were the beneficiaries of the legislation.

In the following cases, the pupils (and not the schools) were held to be the beneficiaries of the legislation; accordingly, the decisions in these cases were in favor of the constitutionality of legislation which provided for the free use of textbooks by or the free transportation of pupils of private schools.

Borden v. *Louisiana State Board of Education*, 168 La. 1005, 123 So. 655 (1929);

Cochran v. *Louisiana State Board of Education*, 168 La. 1030, 123 So. 664 (1929);

Cochran v. *Louisiana State Board of Education*, 281 U. S. 370, 74 L. Ed. 913 (1930);

Board of Education v. *Wheat*, 174 Md. 314, 199 Atl. 628 (1938);

Adams v. *County Commissioners*, 26 Atl. (2d) 137 (1942);

Chance v. *Mississippi Textbook R. & P. Board*, 190 Miss. 453, 200 So. 706 (1941).

In the light of this aggregation of statutes, opinions of Attorneys General and decisions of the Courts supporting it must be concluded that when the Legislature of New Jersey enacted the challenged statute, it was acting in an entirely reasonable and non-arbitrary manner, and that such action was immune against assault. Its action, both as to power and classification, finds complete vindication in the following cases decided by the United States Supreme Court.

International Harvester Co. v. *Missouri*, 234 U. S. 199, 34 Sup. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525. In that case attention is called to the distinction between legislative power and the wisdom of its exercise in these words:

" 'It is to be remembered that the question presented is of the power of the Legislature—not the policy of the

exercise of the power. To be able to find fault, therefore, with such policy, is not to establish the invalidity of the law based upon it.'

"So in *Chicago, Burlington & Quincy Railway Co.* v. *McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328, it is said:

" 'The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the Legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

" 'The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the Legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the Legislature may be guided by experience. *Patsone* v. *Pennsylvania*, 232 U. S. 138-144. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may "proceed cautiously, step by step," and "if an evil is specially experienced in a particular branch of business," it is not necessary that the prohibition "should be couched in all-embracing terms." *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401-411. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. *Keo-*

kee Consol. Coke Co. v. *Taylor*, 234 U. S. 224-227.' *Miller* v. *Wilson*, 236 U. S. 373, 35 Sup. Ct. 342, 59 L. Ed. 628, L. R. A. 1915 F, 829.

"One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. A distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley* v. *Natural Carbonic Gas Company*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912 C, 160. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917 A, 421, Ann. Cas. 1917 B, 455. These are general principles which control judicial inquiry into the question of legislative power, and they have been applied in the cases which have been cited and those mentioned in the opinions in those cases and in numerous other cases in a great variety of circumstances."

That the children in private schools and in sectarian schools should not be discriminated against is well stated in *Pierce* v. *Society of Sisters*, 268 U. S. 510. "The Oregon Compulsory Education Act * * * with certain exemptions, requires every parent * * * of a child between the ages of eight and sixteen years to send him to the public school in the district where he resides * * *". This was held by a unanimous U. S. Supreme Court to be an unreasonable interference with the liberty of parents to direct the upbringing of the children, and in that respect violative of the Fourteenth Amendment.

That Court, speaking through Mr. Justice McReynolds, said, at pp. 534, 535:

"The inevitable practical result of enforcing the Act under consideration would be destruction of appellees' primary schools, and perhaps all other private primary schools for normal children within the State of Oregon. These parties are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students or the State. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.

"Under the doctrine of *Meyer* v. *Nebraska*, 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations."

It is important here to state the activities of the state in compulsory education and with respect to children generally. I refer of course to New Jersey.

Beginning in the early part of the last century, our citizens began to consider the subject of the education of their

children not only as eminently deserving their own attention, but as entitled to the fostering care of the State, and while in the course of years since then the Legislature has never undertaken to assert a monopoly of the education of the children, it has in accordance with the command of the constitutional provision (Article IV, Section 7, par. 6) and otherwise, by appropriate statutes, undertaken to protect and advance the interest of the children of the State generally, not only by providing free public schools but also by promoting the educational advancement of children generally. The most outstanding legislation dealing with the education of children generally is that contained in the so-called Compulsory Education Act (R. S. 18:14-14). In substance, this statute, so far as here pertinent, provides that every parent, guardian, or other person having custody and control of a child between the ages of seven and sixteen years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments, or to receive equivalent instruction elsewhere than at a school, unless such child is above the age of fourteen years and has completed the work of the eighth grade in the public school or equivalent work in a private school, or is above the age of fifteen years and has completed the work of the sixth grade, or has completed an approved educational program in lieu thereof and has been granted an age and schooling certificate and is regularly and lawfully employed in some useful occupation or service. (A discussion of this statute will be found in *Stephens* v. *Bangart*, a case in the Domestic Court of Essex County and reported in 15 N. J. Misc. R. 80, 189 All. Rep. 131). Further State interest in the children attending private schools is manifested in the following instances:

R. S. 18:19-1, prohibiting the infliction of corporal punishment upon a pupil attending such school.

R. S. 18:19-8, prescribing that regular courses of instruction in the Constitution of the United States shall be given in private schools.

R. S. 18:19-4 to 6, dealing with fire prevention.

R. S. 18:19-7, defining "private schools."

R. S. 18:3-18, requiring that annual report be made by the private schools to the Commissioner of Education.

R. S. 18:20-8, requiring that the private school, as a condition precedent to conferring or participating in the conferring of degrees upon any person, submit to conditions prescribed by the State Board of Education.

R. S. 18:14-34, dealing with truancy and juvenile delinquency.

R. S. 18:14-35, 36, 37, 38, 39, 40, providing for returning by attendance officer of truants to parents or school, compelling attendance of children at school; visiting penalties upon parent, etc., for failure to comply with the law; providing for procedure against parent as a disorderly person, and authorizing the issuance of a warrant by the Court against parent and child, etc. The fees of attendance officers are paid by money raised by taxes.

Hence, even if transportation of children was paid for out of the school fund, it was in no sense "free state aid" or a "donation to a sectarian school."

It referred solely to transportation of children to and from school. But the School Law makes attendance compulsory and provides for the payment out of the fund of an "attendance or truant officer" whose duty it is to compel attendance of truants and deliver them to the school, at the State's expense. This, of course, is a prime example of the legitimate exercise of the "police power," which extends to the regulation of education.

The matter of attendance at school is under the State's supervision and control. By law it compels and enforces

attendance at both public and private schools, it supervises and compels such attendance through attendance or truant officers, at public expense, and the matter of transporting children is entirely under its control and may be continued or terminated at its own free will.

The State cannot make a donation to a private school directly or indirectly? This is bosh! It would permit exemption from taxation to a private school, and if a valid statement, then it would prohibit the service of an attendance or truant officer; or a school doctor, all of which our statutes provide for.

The cases, other than *Gurney* v. *Ferguson,* which has already been discussed herein, cited by Appellant under point 5 of his Statement of Jurisdiction are *Judd* v. *Board of Education,* 278 N. Y. 200, 15 N. E. 2d 576; *State ex rel. Traut* v. *Brown,* 36 Delaware 181, 172 A. 835; *Mitchell* v. *Consolidated School Dist. No. 201,* 135 P. 2d 79; *Sherrard* v. *Jefferson County Board of Education,* 294 Ky. 469, 171 SW. (2d) 963; and *State ex rel. Van Straten* v. *Milquest,* 180 Wis. 190, 192 N. W. 392, all fall under the class of cases where the State courts, in the light of the State Constitutional provisions, held the free transportation of pupils to be in aid of the school. None of them went to the U. S. Supreme Court. In not a single one of them was the 14th Amendment to the Federal Constitution relied upon in the decisions. They were all cases decided on the ground of violation of the provisions of the State Constitutions. In *Judd* v. *The Board of Education* the Court split, 4 Judges voting for the aid to the school theory and 3, including the Chief Justice, voting against it. The opinion of Crane, C. J., dissenting, stated that "having made attendance upon instruction compulsory and having approved of attendance at certain schools other than public schools" [as has been done in New Jersey] "the Legislature determined that the

inhabitants of the district should have the power, under certain conditions, to provide for the transportation to and from the schoolhouse in the district or the school which they legally attend."

After the decision of the court in *Judd* v. *Board of Education*, supra, and in the same year, i.e., 1938, a constitutional convention proposed, and the people of New York adopted, an amendment to the New York Constitution, by which the legislature was expressly authorized "to provide for the transportation of school pupils to and from any school or institution of learning." After the adoption of the constitutional amendment, appropriate legislation was enacted and under it New York provides free transportation to pupils attending private schools. Thus, the people of New York overruled the Court of Appeals of their State and exhibited a liberality of view that was sadly lacking in the majority opinion in the *Judd* case. The course of this amendment and these statutes will be found in Appendix No. 1 attached hereto.

APPENDIX NO. 1

RESUME OF LEGISLATION PERTAINING TO TRANSPORTATION OF SCHOOL CHILDREN IN THE STATE OF NEW YORK

1. First bill introduced in 1935. Passed Legislature and vetoed by Governor Lehman on May 11, 1935.

2. Substantially same Legislation introduced in 1936. Signed by the Governor on May 13, 1936.

3. Constitutionality tested November 1937. Upheld by the Supreme Court, Second Department. Affirmed by Appellate Division, Second Department.

4. The two lower courts were reversed, and Legislation declared unconstitutional by Court of Appeals, four to three decision on May 24, 1938.

5. Constitutional Convention in fall of 1938, Renumbered Article 9, Section 4, to Article 11, Section 4, and added: "* * * but the Legislature may provide for the transportation of children to and from any school or institution of learning." Approved by vote of people on November 8, 1938. This removed the objections of the Court of Appeals to constitutionality of that provision.

6. Chapter 465 of the laws of 1939 added Subdivision 18 of Section 206 and Section 503 of the Education Law. Signed by the Governor and became law on May 16, 1939, and gave force and effect to the constitutional change.

If, therefore, the Statute offended against the 14th Amendment to the Federal Constitution, so does the Amendment to the New York Constitution.

The decision in State *v.* Traut and Brown, *supra*, was that merely of the Superior Court, consisting of two Judges, and not of the Supreme Court of the State. Mitchell *v.* Consolidated School Dist. No. 201 was a 5 to 4 decision, and the reasoning of the dissenting Judges is most cogent. The

other two cases cited were not, as has been said, cases involving the Fourteenth Amendment to the Federal Constitution. There is no question involved in the instant case of doing by indirection what is prohibited from being done directly, or of danger, if the present case is unreversed, of putting it within the discretion of the legislature, free of constitutional restraint, to provide for practically the entire cost of education in private and parochial as well as in public schools. Such a contention is ridiculous. The State Constitution and its Courts are still the guardians of the Police power of the State, and of the sanctity of its Constitutional restraints, and this Court will not attribute to the State Courts an unwillingness to perform their full duty in furnishing such protection. This Court has decided in the case of Cochran *v.* Louisiana, *supra,* that furnishing free textbooks to private schools is not in violation of the Fourteenth Amendment to the Federal Constitution or directly advancive of Sectarian schools. Many other courts and legislatures as shown above, are of the same opinion, and the cases hereinbefore cited completely explode any such contention.

Points #7 and #8 are utterly without substance. The school books in the *Cochran* case were furnished free to the pupils, but Chief Justice Hughes disposed of this contention by saying "Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matter of exclusively private concern. Its interest is education, broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded." The same doctrine was stated in Board of Education of Baltimore *v.* Wheat, *supra,* where it was said 'School attendance is compulsory, and attendance at a private or parochial school is a compliance with the law." What has already been said applies to points #9, #10, #11, #12, #13, and #14. The same points were posited in the *Cochran* case and they were definitely overruled by the Supreme Court of the United States; and concluding this part of the discussion, I can-

not do better than quote an excerpt from the opinion of Honorable Smith Troy, Attorney-General of the State of Washington, submitted to the Prosecuting Attorney of Yakima County, Washington, on August 6, 1941, with respect to the constitutionality of the Washington transportation statute, as applied to private school. Among other things, the Attorney-General said:

"When the legislature, in the exercise of its sovereign police power, declares that the health and safety of children attending all schools is to be promoted by avoiding and minimizing accidents and traffic hazards through public transportation, and that private and parochial school children are to be benefited (sic) in this regard as well as public school children, it is difficult to perceive how such transportation will unconstitutionally advance religious worship and distruction or how the public facilities employed in this promition (sic) of child welfare will be applied to the support of religious establishments. Children of this county have ever attended and still attend sectarian schools where they have ever received and still receive spiritual as well as secular instruction. Their religious training will be neither increased nor furthered because they come on public wheels rather than on private shoe leather. The constitutional provision is aimed against direct, concrete support of denominational schools—in the matter of public transportation it is no more concerned with incidental and intangible aid to parochial schools than is a subsequent provision, prohibiting the giving of public money or property in aid of a private individual, concerned with similar benefits which casually and indirectly accrue to the public school child's parent whose pocketbook is relieved of some expense for wear and tear on boots. Upon this score we distinguish as not in point of the New York decisions (Smith *v.* Donahue, 202 App. Div. 656; Judd *v.* Board of Education, 15 N. E. (2d) 580), which are grounded on a former express constitutional prohibition against direct and indirect aid, and the Delaware ruling (State ex rel. Traub *v.* Brown, 172 A. 835), which is inaptly based on the Donahue case, *supra*. Controlling, we believe, is the argument of

the Louisiana court (Borden *v.* State Board of Education, 123 So. 655) as follows:

"* * * One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public schools. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries * * *"

It is next contended in Point #15 that the "Resolution" of the Appellee Board of Education is legislation respecting an establishment of religion and for the support of religious tenets in that it contains no provision for the transportation of children to sectarian schools generally, but segregates the schools and pupils designated as beneficiaries, and makes no provision for transportation of children attending sectarian school other than Catholic Schools."

This argument is very tenuous. In the early part of this Statement, I set forth evidence bearing upon the adoption of this Resolution with a copy of the Resolution itself. It is there made clear that all pupils of private schools who desired transportation made individual application therefor and none were denied. The resolution was a mere order for payment or re-imbursement to such as made application therefore and were entitled to it.

A School District Board is in no sense a legislative body and does not legislate, N. J. S. A. 18:7-57 et seq. Its function is in no sense legislative and its action in adopting the challenged resolution bore not the slightest resemblance to a legislative act.

As the terms are commonly used in charters, there is a distinction between an ordinance and a resolution. The

corporation cannot accomplish by an order or resolution that which, under its charter, can be done only by an ordinance. Whether the particular thing should be done by ordinance or resolution depends upon the proper construction of the charter and the forms observed in doing an act. A resolution deals with matters of a special or temporary character; an ordinance prescribes some permanent rule of conduct or government, to continue in force until the ordinance is repealed, and is distinctively a legislative act. It may be stated broadly that matters upon which the municipal corporation desires *to legislate* must be put in form of an ordinance, while all acts that *are done* in a ministerial capacity and for a temporary purpose may be put in the form of resolutions. This is the rule in New Jersey. Stemmel *v.* Madison Borough 82 N. J. L. 62; 66; Hunt *v.* Lamberville, 45 N. J. L. 279; State *v.* Bayonne, 35 N. J. L. 335. Ordinance is the equivalent of legislative action, but resolution is not.

The Resolution is not shown to have adversely affected a single pupil or parent in the Township of Ewing and the statute which authorized its passage applies, under appropriate and legal classification to *all* pupils attending *private, non-profit schools.* It is trite law that, "it is not sufficient that the statute is unconstitutional as to other persons or classes of persons (Burgois, Inc. *v.* Chapman, 301 U. S. 183; Pierce *v.* Society of the Sisters of the Holy Name of Jesus and Mary, 268 U. S. 510). It must affirmatively appear that the person attacking the statute comes within the class of persons affected by it. Heald *v.* District of Columbia, 259 U. S. 114. Here it does not appear that a single person, let alone the Appellant, was affected by the resolution which merely applied the statute to all persons to whom it could be applicable within the Township, non constat that there was a single person in that Township who could or did attempt to take advantage of it. See also City of Allegan, Mich. *v.* Consumers Power Co., 71 F. 2d 477, certiorari denied, Consumers Power Co. *v.* City of Allegan, 293 U. S. 586; Peak *v.* Court of Internal Revenue, C. C. A. 80 F 2d, 761, certiorari denied, 298 U. S. 666, to the effect that "no taxpayer may question the constitutionality of a statute

who is not directly affected to his injury or prejudice by its allegedly unconstitutional feature." In the case in hand there was not the slightest evidence to show that the money spent for the challenged transportation was raised by local or indeed by any taxation whatever which could or did affect the Appellant.

As bearing upon the argument that any indirect or collateral benefit is obnoxious to the Fourteenth Amendment, I would point out that the rule which reason and inveterate practice alike have sanctioned is well stated in Dunn *v.* Chicago Industrial School, 280 Ill. 613, 117 N. E. 735, in deciding a case in the light of Constitutional provisions much more specific and restrictive than ours. "Not only have the people, by the Constitution and by their representatives in the General Assembly, recognized and provided for the enjoyment of religious liberty, but the court has not adopted any rule antagonistic thereto." In Nichols *v.* School Directors, 93 Ill. 61, 34 Am. Rep. 160, the Court said:

> "Religion and religious worship are not so placed under the ban of the Constitution that they may not be allowed to become the recipient of any incidental benefit whatever from the public bodies or authorities of the state."

The list of things conceivable as legal incidental benefits to churches, private and parochial schools, monasteries and nunneries, is extremely long and many of them are enumerated in my brief. In the Dunn case, supra, it was paying a sectarian institution for the care of wards of the State. The prime example, of course, is exemption from taxation, which New Jersey grants religious and secular institutions, whether public or private, and classifies by limiting it to those not conducted for profit, (R. S. 54:4-3.6) thus adopting the precise classification challenged by Appellant in the instant case. There is a vast difference between the constitutional provision that "Congress shall make no law respecting an establishment of religion and a complaint that the law affects a religious establishment." Bradfield *v.* Roberts, 175 U. S. 291. Our Constitution,

Article 1, Paragraph 4, provides "There shall be no establishment of one religious sect, in preference to another; no religious test shall be required as a qualification for any office or public trust; and no person shall be denied the enjoyment of any civil right, merely on account of his religious principles." There surely is no evidence of any attempt to the establishment of one religious sect, in preference to another, in the instant case. The challenged act, Chapter 191, Laws of 1941, makes no reference to any religious sect whatever. It expressly refers to the transportation "of school children to and from school other than a public school except such school as is operated for profit in whole or in part." Here, it will be observed, all school children in public schools and in private schools not operated for profit are treated exactly alike. No effort is made for the establishment of one religious sect, in preference to another, but, on the contrary, a clear intention to treat all school children, who come within the class designated in the Act, exactly alike. Furthermore, it clearly appears that Prosecutor-Appellee's complaint is not that the establishment of a religious sect is attempted by the Act, but that it results in incidentally benefiting a religious establishment.

Wherefore, Appellees respectfully submit this statement showing that the questions upon which the decision of this cause depends are so insubstantial as not to need further argument, and appellees respectfully move the court to dismiss this appeal, or in the alternative, to affirm the judgment of the New Jersey Court of Errors and Appeals entered below.

Respectfully Submitted,

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WILLIAM H. SPEER,
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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1946

No. 52

ARCH R. EVERSON,

Appellant,

—vs.—

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER, *et al.*,

Appellees.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

BRIEF ON BEHALF OF APPELLEES

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SUBJECT INDEX

	PAGE
Introductory Statement	1
Summary of Argument	7
ARGUMENT	8
I. The judgment below should be affirmed on the authority of *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370 (1930)	8
II. The New Jersey Statute does not deprive appellant of property without due process of law	18
A. The Expenditure is for a Public Purpose	18
B. It is a Valid Exercise of the Police Power of the State	22
1. It is an aid to education	22
2. It facilitates compliance with, and is complementary to, the compulsory education laws of the State	24
3. It promotes the health, safety and welfare of the schoolchildren of the State	25
C. Since the main purpose of the statute is public, it does not become unconstitutional by reason of any incidental benefit to individuals	26
III. The New Jersey Statute does not constitute an establishment of religion	27

PAGE

IV. A decision holding the New Jersey Statute unconstitutional would strike down similar legislation in at least fifteen other States, would cast doubt upon the validity of several acts of Congress, and would forever disable all of the States from legislating with respect to the transportation of children other than those attending public schools 52

A. State Legislation 52

B. Federal Legislation 56

CONCLUSION 59

APPENDIX 61

TABLE OF CASES CITED

Adams v. *County Commissioners*, 180 Md. 550, 26 A. (2d) 377 (1942) 25, 50, 64

Arkadelphia Co. v. *St. Louis S. W. Ry. Co.* 249 U. S. 134 (1919) 14

Atlantic Coast Line R. Co. v. *Powe*, 283 U. S. 401 (1931) 46

Barbier v. *Connolly*, 113 U. S. 27 (1885) 22

Board of Education v. *Barnette*, 319 U. S. 624 (1943) 22

Board of Education v. *Wheat*, 174 Md. 314, 199 Atl. 628 (1938) 25, 50, 66

Borden v. *Louisiana State Board of Education*, 168 La. 1005, 123 So. 655 (1929) 8, 65

PAGE

Bowker v. *Baker*, 167 P. (2d) 256 (Calif. Dist. Ct. of App. 1946) 50, 61
Bradfield v. *Roberts*, 175 U. S. 291 (1899) 29, 39
Butler v. *Pennsylvania*, 10 How. 402 (U. S. 1850) 20

Cantwell v. *Connecticut*, 310 U. S. 296 (1940) 28
Carmichael v. *Southern Coal Co.*, 301 U. S. 495 (1937) 9, 17, 18, 27
Chance v. *Mississippi State Textbook Rating and Purchasing Board*, 190 Miss. 453, 200 So. 706 (1941) 11, 30, 49, 66
Citizens National Bank v. *Kentucky*, 217 U. S. 443 (1910) 14
Clark v. *Nash*, 198 U. S. 361 (1905) 27
Cochran v. *Louisiana State Board of Education*, 168 La. 1030, 123 So. 664 (1929) 8, 49
Cochran v. *Louisiana State Board of Education*, 281 U. S. 370 (1930) 6, 7, 8, 11, 12, 13, 15, 16, 17, 23, 27, 30, 34, 39, 43, 51, 65
Corporation Commission of Oklahoma v. *Lowe*, 281 U. S. 431 (1930) 20
Costigan v. *Hall*, 23 N. W. (2d) 495 (1946) 41, 72
Cusack v. *City of Chicago*, 242 U. S. 526 (1917) 14

Davis v. *Beason*, 133 U. S. 333 (1890) 28

Everson v. *Board of Education*, 133 N. J. L. 350, 44 A. (2d) 333 (1945) 69

PAGE

Failbrook Irrigation District v. *Bradley*, 164 U. S. 112 (1896) 19

Gurney v. *Ferguson*, 190 Okla. 254, 122 P. (2d) 1002 (1941), 317 U. S. 588; 317 U. S. 707 (1942) 10, 45, 46, 71

Hairston v. *Danville & Western Ry.*, 208 U. S. 598 (1908) 27

Interstate Railway Co. v. *Massachusetts*, 207 U. S. 79 (1907) 22

Jones v. *City of Portland*, 245 U. S. 217 (1917) 19
Judd v. *Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576 (1938) 10, 42, 43, 44, 45, 48, 70

Loan Association v. *Topeka*, 20 Wall. 655 (U. S. 1874) 21

Meyer v. *Nebraska*, 262 U. S. 390 (1923) 22, 33
Milheim v. *Moffat Tunnel Dist.*, 262 U. S. 710 (1923) 27
Mitchell v. *Consolidated School District*, 17 Wash. (2d) 61, 135 P. (2d) 79 (1943) 10, 47, 74
Murdock v. *Pennsylvania*, 319 U. S. 105 (1943) 28

Nichols v. *Henry*, 301 Ky. 434, 191 S. W. (2d) 930 (1945) 25, 27, 36, 46, 50, 65
Noble State Bank v. *Haskell*, 219 U. S. 104 (1911) 26

PAGE.

Pierce v. *Society of Sisters*, 268 U. S. 510 (1925) 2, 22, 23, 30, 32, 33, 71

Quick Bear v. *Leupp*, 210 U. S. 50 (1908) 39

Reynolds v. *United States*, 98 U. S. 145 (1878).... 28
Rutz v. *Marek*, (Circuit Ct. of Chippewa County, Wis. (1941, unreported)) 41, 74

Schiltz v. *Picton*, 66 S. Dak. 301, 282 N. W. 519 (1938) 72
School District v. *Wright*, 128 Okla. 193, 261 P. 953 (1927) 25
Sherrard v. *Jefferson County Board of Education* 294 Ky. 469, 171 S. W. (2d) 963 (1942) 10, 46, 47, 65
State ex rel Traub v. *Brown*, 36 Del. 181, 172 Atl. 835 (1934) 10, 42, 62
State ex rel Van Straten v. *Milquet*, 180 Wis. 109, 192 N. W. 392 (1923) 40, 48; 74
Supervisors v. *Stanley*, 105 U. S. 305 (1881) 14

Toombs v. *Citizens Bank of Waynesboro*, 281 U. S. 643 (1930) 20

U. S. v. *Carver*, 260 U. S. 482 (1923) 46

Visser v. *Nooksack School Dist.* (Superior Ct. Whatcom County, Wash.) 74

Waugh v. *Board of Trustees*, 237 U. S. 589 (1914). 22
Williams v. *Baltimore*, 289 U. S. 36 (1933) 20

PAGE

TABLE OF STATUTES CITED

California Constitution, Art. IV, §30 50

Delaware Constitution, Art. X, Sec. 3 42
Delaware Laws, Vol. 38, Ch. 142 42
District of Columbia Code, Title 44, Sec. 44-214 6

Kansas General Statutes (1945 Supp.) Sec. 72-4107A 10
Kentucky Acts of 1940, Ch. 66 46
Kentucky Acts of 1944, Ch. 156 46

Louisiana Act 100 of 1928 8
Louisiana Act 143 of 1928 8

Mississippi Code, Sec. 6656 (1942-1944 Supp.); Ch. 18 L. 1940 10

New Mexico Statutes Annotated, Sec. 55-1703; (L. 1933, Ch. 112, Sec. 5) 11
New Jersey
N. J. S. A. 18:3-8 38
18:14-8 (Ch. 191 P. L. 1941) 3, 4
18:14-14 ..... 2, 3, 29
18:14-18 2
18:14-35 24
18:19-1 38
18:19-2 — 19-9 38
18:19-7 ..... 28, 38
18:20-8 38

PAGE

New York Constitution, Art. XI, Sec. 4 ..... 43, 44
New York Education Law, Sec. 206 ..... 43, 45
New York Education Law, Sec. 503 45
New York Laws of 1936, Ch. 541 (Education Law, Sec. 206) 43
New York Laws of 1939, Ch. 465 45
Northwest Ordinance (1787), Art. III 30

Oklahoma Constitution, Art. II, Sec. 5 45
Oklahoma Session Laws, 1939, Ch. 34 45
Oregon Compiled Laws Ann. Sec. 111-2015 (1943 Supp.); L. 1941, Ch. 485, Sec. 1 11

Federal Statutes
46 Stat. 1419 (Act of Feb. 25, 1931) 57
47 Stat. 759 (Act of Jan. 14, 1933) 57
42 U. S. C. §§1751-1760 (Act of June 4, 1946, 60 Stat.) 6, 56, 57
38 U. S. C. §701 (f) 57

United States Constitution
First Amendment 13, 27, 28, 29, 39, 48, 55, 56
Fifth Amendment 56
Fourteenth Amendment 5, 6, 8, 13, 18, 20, 25, 26, 27, 28, 39, 49, 50, 55

United States Public Law 679, C. 886 (Act of August 8, 1946) 6

PAGE

Washington Constitution
Art 1, Sec. 11 48
Art. 9, Sec. 2 47
Art. 9, Sec. 4 47
Washington Laws of 1941, Ch. 51 47
West Virginia Code of 1943, Sec. 1782 (2) (21B) 74
Wisconsin Constitution, Art. I, Sec. 18 and Art. X, Sec. 3 41
Wisconsin Laws of 1921, Sec. 40.16, subd. 1(c) 40
Wisconsin Laws of 1939, Sec. 40.34 (1) and (2) 40
Wisconsin Session Laws 1943, Ch. 526, Sec. 1 41

Statutes of the various States pertaining to school bus transportation are compiled in Appendix A.

Supreme Court of the United States

OCTOBER TERM, 1946

No. 52

ARCH R. EVERSON,

Appellant,

—vs.—

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER, *et al.*,

Appellees.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

BRIEF ON BEHALF OF APPELLEES

Introductory Statement

The sole question for decision is this:

> **Does the Federal Constitution debar a State from using its own funds to transport children to and from all non-profit schools (private as well as public) which those children attend in obedience to the compulsory education laws of the State?**

The constitutional principles involved are well established. The application of those principles in this case, and the decision to be rendered by this Court, have a direct bearing on the present legislation and public policy of at least 16 States, and will intimately affect millions of citizens for generations to come.

New Jersey, like every other State in the Union, recognizes education as the cornerstone of free government.

This does not mean that education is the concern solely of the State. It is the inalienable natural right, and the inescapable natural duty, of parents to see that their children are educated for life through agencies of their own choosing.

So far as that duty is concerned, it is recognized and enforced by a New Jersey statute which requires the parents of every child of school age to cause that child to be educated, and which punishes them as disorderly persons if they fail to do so (N. J. S. A. 18: 14-14 and 14-18).

So far as that right is concerned, it is recognized and protected by the Constitution of the United States. In *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925), this Court unanimously declared:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

By specific statute enacted long before that decision, New Jersey recognized that it was the right of the parents to select the agencies which should educate their children. The same statute which places upon parents the responsibility for the education of their children provides that that responsibility may be discharged either (i) by attendance at a public school, or (ii) by attendance at "a day school in which there is given instruction equivalent to that provided in the public schools", or (iii) by "equivalent instruction elsewhere than at school"—*i.e.* instruction by a

private tutor or by the parents themselves (N. J. S. A. 18: 14-14). Whenever the requirements of that statute are met, whatever may be the type of instruction selected by the parents, the public purpose of the compulsory education laws has been served and a public benefit has accrued to the State.

If children are to be educated, they must first get to school. (The exceptional case of the private tutor may be passed over for present purposes.) The old days of the one-room school house, reached on foot, over highways devoid of motor traffic, by children residing in the immediate neighborhood, are now long past in New Jersey, as in most other sections of the country. Centralization, with the educational advantages and the traffic hazards it involves, is now the rule.

To meet the new situation arising out of both the advantages and the resultant hazards of the automobile, New Jersey, like many other States, has provided transportation facilities at public expense for children attending the schools of their parents' choice in obedience to the compulsory education laws of the State. The New Jersey statute provides (N. J. S. A. 18:14-8):

> "Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.
>
> "When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established

school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part." Ch. 191, P. L. 1941, amending R. S. 18: 14-8.

Ewing Township, whose Board of Education is an appellee here, is a rural area adjacent to the City of Trenton. It has a public grade school, but no high school of any kind (R. 19). Children attending private schools of elementary grade, and all children attending high schools, whether private or public, must go elsewhere.

In accordance with the statutory authority, the Board of Education of Ewing Township adopted a resolution providing for transportation of those children at public expense (R. 13). Under the practice adopted by the Board, all children traveled on the regular public buses to their various destinations, and paid the regular fare (either 20¢ or 22¢ per day, depending on whether a transfer was required (R. 21)). Public school pupils were transported to the public high schools in Trenton and Pennington, and parochial school pupils were transported to parochial schools in Trenton. Of the 21 pupils whose cases are here involved, and whose parents are among the appellees, five attended parochial schools in the elementary grades, and 16 attended parochial high schools (R. 46). At regular intervals, on certificates issued by the respective public and parochial school principals showing the number of days' attendance by each child, his parents were reimbursed by the Board of Education. For the period involved here, those reimbursements amounted to $8,034.95, of which $357.74 went to the parents of parochial-school pupils, and the balance to parents of public-school pupils (R. 46). No part of the funds went to any school, public or private. Those reimbursements, so far as the parents of parochial-school

children are concerned, and the statute which authorized them, are now claimed by the appellant, a taxpayer of the township, to be obnoxious under the Fourteenth Amendment (a) because they involve the taking of private property for a private purpose and (b) because they amount to an establishment of religion.

Appellant's claims do not involve the State of New Jersey alone. They have a direct bearing upon the present and future legislative policies of every State in the Union. As shown later in this brief, the problem of transporting school children (and this means *all* children attending schools in compliance with compulsory education laws, not merely those who happen to go to the public schools) has been engaging the earnest attention of legislative bodies throughout the country. The various States have handled the problem in various ways. Some of them thus far have provided transportation for public-school children only. A rapidly increasing number, amounting at present to at least 16 States and the District of Columbia, provide in one way or another for transportation of children to and from both public and private schools. In some cases private-school children are carried free on the public-school buses. In others, separate buses are provided for each school, whenever the traffic warrants. In others, as in the case at bar, both groups of children are transported at public expense by common carrier. In others, carriers are required to provide reduced fares for all school children, public and private alike. In one case (New York), where the State Constitution had been construed by a 4 to 3 decision of the Court of Appeals to prohibit the use of public funds for transporting private school pupils, the voters promptly amended the Constitution to remove the difficulty. In another (Wisconsin), the voters will pass on a similar proposed amendment this year.

All of this legislation, existing and prospective, the appellant now asks this Court to strike down forever. Appellant is now asking this Court, under color of the Fourteenth Amendment, not merely to invalidate a statute adopted by the Legislature of New Jersey and sustained by its highest court, but to invalidate similar statutes of at least 15 other States, to rivet the fetters of unconstitutionality upon every attempt to deal with the situation, and to declare that no State may ever lawfully provide for the transportation at public expense of any child to any school but a public one.

Nor is this all. If, as appellant claims, no State may lawfully provide free transportation for children attending non-public schools, by what right may a State provide free school-books for such children? Six States are now doing so; and their right to levy taxes and expend public funds for that purpose was specifically upheld under the Fourteenth Amendment in *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370 (1930)—a decision which we submit is conclusive in the case at bar.

On appellant's theory, moreover, the validity of a whole series of Acts of Congress is necessarily drawn in question. Can the street railway and bus lines of the District of Columbia lawfully be required (Title 44, Sec. 44-214, Dist. of Col. Code, 1940) to transport children to and from both public and private schools at reduced fares? Can Federal funds be used, as Congress has provided (Act of June 4, 1946, c. 281, 60 Stat——, 42 U. S. C. §§1751-1760), to furnish government subsidized lunches to both private and public school pupils throughout the nation, and lunch-room equipment to the schools themselves? Can Congress lawfully make grants to denominational schools and colleges for the support and tuition of veterans under the G. I. Bill of Rights (Act of August 8, 1946, c. 886, Public Law 679, 79th Cong., 2d Sess.)?

We say that there is nothing in the Federal Constitution to prevent either Congress or the States from dealing with such problems in accordance with public policy and local need. Upon sound reasoning and decided authority alike, appellant's claims are without merit; and the judgment below should be affirmed.

Summary of Argument

I. If the States may provide textbooks at public expense for all children attending both public and private schools, as this Court unanimously decided in *Cochran* v. *Board of Education*, 281 U. S. 370 (1930), *a fortiori* they may provide transportation for those children.

II. The New Jersey statute does not deprive appellant of his property without due process of law. It is for a public purpose. It is a valid exercise of the police power, as an aid to education, as facilitating compliance with the compulsory education laws of the State, and as promoting the health, safety and welfare of school-children. It is not unconstitutional by reason of any incidental benefits to private individuals.

III. That statute does not amount to legislation respecting an establishment of religion.

IV. A decision holding the New Jersey statute unconstitutional would strike down similar legislation in at least 15 other States, would cast doubt upon the validity of several Acts of Congress, and would forever disable all of the States from legislating with respect to the transportation of children other than those attending public schools.

I

The judgment below should be affirmed on the authority of *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370 (1930).

By Acts No. 100 and No. 143 of 1928 the Legislature of Louisiana provided for the furnishing of school books at public expense "to the school children of the State". The Acts were intended to benefit all school children, public and private alike, and were so interpreted and administered by the local authorities.

In *Borden* v. *Louisiana State Board of Education*, 168 La. 1005, 123 So. 655 (1929), the Supreme Court of Louisiana sustained those acts under both the State and Federal Constitutions. A companion case (*Cochran* v. *Board of Education*, 168 La. 1030, 123 So. 664) was decided the same day on the authority of the *Borden* case.

The *Cochran* case was thereupon appealed to this Court, where the Louisiana legislation was attacked by the appellants under the Fourteenth Amendment upon the ground that the furnishing of textbooks at public expense to children attending private schools was a taking of the taxpayers' property for private use, in violation of the Fourteenth Amendment. The arguments advanced by appellants in that case were substantially the same as those advanced by appellant here. Indeed, the very issue of transportation was specifically urged in the following words, by two of the same counsel who now argue that issue for the appellant in the case at bar:

> "If the furnishing of text-books free to children attending private schools is not considered an aid to such private schools, but as incidental to the state educational system, then it logically follows that the

> tuition of the children attending such schools could be paid; *their transportation to and from such schools could be provided*; * * *." (P. 23 of appellants' brief in this Court in *Cochran* v. *Board of Education*, No. 468, October Term 1929; italics ours.)

This Court, in a unanimous opinion delivered by Chief Justice Hughes, sustained the constitutionality of the Louisiana statutes and affirmed the judgment below. After quoting from the portion of the opinion below describing the operation and effect of the legislation, and pointing out that the sole beneficiaries of the legislation were the school children and the State, rather than the schools themselves, this Court said (281 U. S. 370, 375):

> "Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the State is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." *

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* This case has since been cited with approval and its principles followed in *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 518 (1937), where this Court, in upholding the Alabama Unemployment Compensation Act, stated:

> "The end being legitimate, the means is for the legislature to choose. When public evils ensue from individual misfortunes or needs, the legislature may strike at the evil at its source. If the purpose is legitimate because public, it will not be defeated because the execution of it involves payments to individuals. *Kelly* v. *Pittsburgh*, *supra* (104 U. S. 78); *Knights* v. *Jackson*, 260 U. S. 12, 15; *cf. Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 239-240. 'Individual interests are aided only as the common interest is safeguarded.' See *Cochran* v. *Board of Education*, 281 U. S. 370, 375; *cf. Clark* v. *Nash*, 198 U. S. 361, 367; *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 608; *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110."

That decision is on all fours with the case at bar. Furnishing free textbooks to a pupil attending a denominational school is certainly more obnoxious, on appellant's theory, than giving that pupil a free bus ticket to enable him to reach the same school. The parallel between free textbooks and free transportation was in fact pointed out not only in the brief of the unsuccessful party in the *Cochran* case but also in the opinions* of State courts which have rejected free transportation statutes under local constitutional provisions prohibiting appropriations in aid of denominational schools.

Since the decision of this Court in the *Cochran* case, and presumably in reliance thereon, five other States have enacted free textbook laws applicable to public and private school pupils alike:

Kansas—General Statutes, 1945 Supplement, Sec. 72-4107A.

Mississippi—Ch. 18 L. 1940, (now incorporated in Sec. 6656, Mississippi Code, 1942-44 Supplement) sustained as

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* In the footnote on page 13 of his brief, appellant states that the question of free textbooks was "apparently treated as a different question" from that of free transportation in various State cases involving the transportation issue. Of the four cases which he cites, three in fact appear to treat textbooks and transportation as exactly parallel. *State ex rel Traub* v. *Brown*, 36 Del. 181, 172 Atl. 835, 837 (1934); *Mitchell* v. *Consolidated School District*, 17 Wash. (2d) 61, 135 P. (2d) 79, 82 (1943); *Sherrad* v. *Jefferson County Board of Education*, 294 Ky. 469, 171 S. W. (2d) 963, 966 (1942). The fourth case which he cites (*Gurney* v. *Ferguson*, 190 Okla. 254, 122 P. (2d) 1002 (1941), does not discuss the textbook question specifically. *Judd* v. *Board of Education*, 278 N. Y. 200, 213-214, 15 N. E. (2d) 576, 583 (1938), not cited by appellant, treated the issues of textbooks and transportation as exactly analogous. All of the foregoing cases (discussed *infra*, pp. 42-48) turned on the language of the particular State Constitutions involved.

constitutional in *Chance* v. *Mississippi State Textbook Rating and Purchasing Board*, 190 Miss. 453, 200 So. 706 (1941).

New Mexico—L. 1933, Ch. 112, Sec. 5 (Sec. 55-1703, New Mexico Statutes Annotated).

Oregon—L. 1941, Ch. 485, Sec. 1 (Sec. 111-2015, Oregon Compiled Laws Annotated, 1943 Supplement).

West Virginia—Section 1782 (2) (21B), West Virginia Code of 1943.

Appellant, in endeavoring to distinguish the *Cochran* case from the instant one, says (p. 12 of his brief):

> "The lower court had held:
>
> "1. That the school books furnished to the children were not sectarian books for use in religious schools but were in fact the public school books adopted and used in the public schools.
>
> "2. That the books were merely loaned to the pupils and were not given to them."

This is a distinction without a difference. In the first place, the transportation furnished to the children is not sectarian transportation. It has no use whatever in the private schools, but is in fact the same transportation used by the pupils of the public schools. Secondly, the transportation is also merely furnished to the children for their use in going to and returning from school. In the one case the children are furnished the use of the books without charge to them; in the other they are furnished the use of the bus without charge to them. If the use was

not a gift in the one case it certainly was not a gift in the other.

But, says appellant (p. 13):

> "The analogy to furnishing public school text books to public libraries established and under control of the State and open to all the people with the right of any one to borrow the books for such length of time as the regulations permit—is inescapable."

Some other reflections are at least as inescapable. One is the statement in the *Cochran* opinion itself (281 U. S. 370, 375):

> "The Court [i.e. the Supreme Court of Louisiana] also stated, *although the point is not of importance in relation to the Federal question,* that it was 'only the *use* of the books that is granted to the children, or, in other words, the books are lent to them' ". (Italics ours.)

A second one is that if there must be an analogy, it would seem that the distribution of free textbooks for use in and by private schools is far more similar to payment by the State of tuition fees to those schools, than is the payment to parents, of transportation expenses, to which transactions the private schools are in no way a party.

A third is that the *transportation* is entirely under the control of the State. It may grant or withhold it at its pleasure and withdraw it whenever it seems desirable to do so.

A fourth is that under the New Jersey statute the transportation (like the textbooks in Louisiana) *was* made available under a proper classification to all alike regardless of

their religious creeds, in which case even appellant admits (p. 13) "there can be no doubt of the power of the State under the Fourteenth or the First Amendment to do so."

In the court below appellant attempted to distinguish *Cochran* v. *Board of Education* on grounds wholly different from those which he now advances; but as the grounds which he advanced below found some expression in the dissenting opinion in the New Jersey Court of Errors and Appeals, they deserve brief consideration.

His first argument was to the effect that the Louisiana textbook statute was for the benefit of all children, while the New Jersey transportation statute excludes children attending private schools operated for profit. *That distinction, which appellant has now abandoned, was the sole point on which he argued the Federal question below.** The argument is wholly unsound.

The parochial schools of Trenton, here involved, were not operated for profit, but in fact were operated at a loss (R. 23). Not a penny of the bus money went to those schools, since reimbursement was solely to the parents (R. 14-15). The record is silent as to the existence in New Jersey of any profit-making school for children of compulsory-school age; and no complaint has been made from any such source. In any event, the distinction made by the New Jersey Legislature between schools which

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* The only mention of the Fourteenth Amendment in appellant's brief in the New Jersey Court of Errors and Appeals was this (p. 77):

> "The use of public funds for the transportation of children to a 'school other than a public school, except such school as is operated for profit in whole or in part,' constitutes a taking of private property for private use and violates the Fourteenth Amendment. The statute does not provide for transportation of all school children of the state, but segregates non-public schools not operated for profit as its beneficiaries. *Cochran* v. *Louisiana State Bd. of Education*, 281 U. S. 370, 74 L. Ed. 913; *Citizens' Sav. & L. Asso.* v. *Topeka*, 20 Wall. 655, 22 L. Ed. 455."

are operated for profit and those which are not is entirely reasonable.*

Moreover, it is the unquestioned rule in this Court that before anyone may be heard to attack State legislation as unconstitutional, he must bring himself within the class affected by the allegedly invalid feature. *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134, 149 (1919). See also *Supervisors* v. *Stanley*, 105 U. S. 305, 311 (1881); *Citizens National Bank* v. *Kentucky*, 217 U. S. 443, 453 (1910). One who is not injured by the operation of a law cannot be deprived by it of either constitutional right or property. *Cusack Co.* v. *City of Chicago*, 242 U. S. 526, 530 (1917).

The record qualifies appellant Everson as a taxpayer (R. 12), and that is all. There is no showing, and no claim, that he is the proprietor of a private school operated for profit, or that he is the parent of any child attending such a school. Even if we assume that the statute unlawfully discriminates against those schools, he has no standing to complain.

In the Court below, appellant also attacked the validity of the *resolution* adopted by the Ewing Township Board of Education on the ground that the resolution, if not the statute, was discriminatory. His argument on that score, although not urged in his brief here, is reflected in the dissenting opinion below (R. 51), and has been resurrected in the briefs of *amici curiae* on his behalf.

The text of the resolution (R. 8) is as follows:

> "The Transportation Commit. recommended the Transportation of Pupils of Ewing to the Trenton High

* Massachusetts, Missouri, and Rhode Island, all of which have school-bus legislation similar to that of New Jersey, have made the same exception with respect to schools operated for profit (Appendix A, *infra*, pp. 67, 68, 71).

and Pennington High and Trenton Catholic Schools, by way of public carriers as in recent years. On Motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted."

Appellant's argument in substance was that although the statute extends its benefits to all school children (except those attending schools operated for profit), the resolution makes an unauthorized discrimination by providing transportation only to those attending the public schools and the Catholic schools. On the same line of reasoning, appellant attempted below to distinguish this case from the *Cochran* case on the ground that while the Louisiana textbook legislation did not segregate private schools or their pupils, the present resolution does make such a segregation.

The answer to this argument is simple and realistic. It is a fair inference from the phrasing of the resolution that the Board of Education of Ewing Township is not composed of expert legal draftsmen, and that the members of the Board had no idea, when they passed the resolution, that they were laying the foundation of a constitutional case in this Court. They were dealing with the facts presented to them and not with legal theories. The only children with whom they were concerned were those living in their district, all of whom, so far as the record shows, attended either the public schools or the Catholic schools. The parents of such children were the only ones who applied for reimbursement. If there had been any other children who desired to attend a school of any other denomination or a school with no denominational affiliation whatever, the Board would have been required by State law to give them equal treatment, and would have done so. As there were none such, the Board discharged its duty

by passing a resolution adapted to reality. Here again, under the authorities cited *supra,* page 14, Mr. Everson has no standing to complain of the hypothetical discrimination, since there is no showing, and no claim, that he was injured by it. In any event, any theoretical deficiency in the draftsmanship of the resolution cannot serve as a basis for invalidating the underlying statute.

In attempting to distinguish this case from *Cochran* v. *Board of Education,* appellant has involved himself in a maze of inconsistencies.

In the court below, he asserted in one breath that the Legislature had no right to transport any child to any private school, and that it was an unconstitutional waste of public funds to do so; and in the next breath he asserted that the Legislature did not go far enough in wasting the public funds, because it excluded from its bounty those children whose parents were opulent enough to send them to private schools operated for profit. In the court below, he said on the one hand that the State had no right to help pupils to attend any denominational school, and on the other hand that the Ewing Township Board was guilty of discrimination by not helping non-existent pupils to attend still more denominational schools. His counsel, when speaking for their then client in the *Cochran* case, roundly asserted that free textbooks and free transportation were exactly alike and were equally bad. The same counsel, when speaking for their present client in the case at bar, now assert that the two are entirely different (a) because the textbooks were merely loaned, while the bus tickets are used up after each ride, and (b) because the textbooks (available on equal terms to all schoolchildren of the State) were not sectarian books, while the buses (likewise available on equal terms to all schoolchildren of the State) are apparently sectarian buses. Counsel admit, as they must in

view of the *Cochran* case, that the State may use the taxpayers' money to furnish free textbooks to a pupil once he reaches a private school, but assert that it may not use a penny of that money to help him get there.

In a more frank approach than that of appellant himself, the Civil Liberties Union recognizes the futility of any effort to reconcile that position with the principles of the *Cochran* case, and in its brief as *amicus curiae* (p. 34) flatly asks this Court to overrule the *Cochran* case in order to invalidate the New Jersey statute.

If there is any distinction between the *Cochran* case and the case at bar, the distinction is in our favor. The furnishing of free textbooks, while it undoubtedly aids the pupil in his education, can hardly be said to promote his physical safety. The furnishing of free transportation does both, by making it easier for him to attend school, and by removing him from the hazards of walking on the highway. The physical safety factor alone has been held sufficient in several cases to justify legislation of the type here involved (*infra*, p. 25); and the decision in the *Cochran* case, where that factor was wholly absent, is *a fortiori* an authority in our favor here.

Cochran v. *Board of Education*—cited with approval in *Carmichael* v. *Southern Coal Co.*, *supra*—is direct and conclusive authority for the constitutionality of the statute here involved; and on the authority of that decision, the judgment below should be affirmed.

II

The New Jersey Statute does not deprive appellant of property without due process of law.

A. The Expenditure is for a Public Purpose.

The narrow issue is simply whether any portion of State tax funds used to reimburse parents for transporting their children to and from all non-profit schools can be said to be spent for other than a public purpose. This case is in the nature of an injunctive proceeding, brought by a taxpayer who claims that public moneys are being spent for a private use. He has no other ground for complaint. If, as we contend, the proposed use is primarily public in nature, then any discriminations not affecting him are immaterial, and any incidental benefits to private interests are not relevant to the question of constitutionality.

Of course, public funds must be spent for a public use, and any deviation from this rule may be a violation of the due process clause of the Fourteenth Amendment. However, before a court proceeds to consider, on the merits, the question whether any given expenditure is for a public use, it should first give due heed to the rule, frequently stated by this Court, that the determination is in the first instance a function of the legislature.

The intent of this Court to give the States free rein to determine those measures which best promote the general welfare of their people is sweepingly stated in *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 514 (1937):

> "This Court has long and consistently recognized that the public purposes of a state, for which it may raise funds by taxation, embrace expenditures for its general

> welfare * * * . * * * whether the present expenditure serves a public purpose is a practical question addressed to the law-making department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court * * * ."

Legislative action is, of course, not conclusive where legal rights are involved; but the legislature's determination is entitled to great respect and should not be lightly overturned. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112 (1896). Here, the New Jersey Legislature has made a considered determination and has duly enacted the results after proper investigation. The highest court of New Jersey has upheld the Legislature's action. Appellant has the burden of proof on his claim that there has been a clear abuse of discretion. There is nothing in the record to show that he has sustained that burden.

In so far as the determination is secondarily a proper function of the courts, there are nevertheless other, self-imposed, limits to the scope of judicial review. In examining the constitutionality of the purposes for which tax moneys are levied or expended, this Court will consider itself bound by the State court's interpretation of the operation and effect of the State law (*Fallbrook Irrigation District* v. *Bradley, supra*); and on the question of what constitutes a public use, it will accord great respect to the State court's determination and will not upset it unless clearly unfounded. *Jones* v. *City of Portland*, 245 U. S. 217, 221-222 (1917). The New Jersey Court of Errors and Appeals has construed the legislation here questioned as "complementary to and in aid of the compulsory education statutes" (R. 51), and has found that the payments "do not constitute the expenditure of public moneys for private purposes" (R. 51).

The record contains nothing inconsistent with that finding, and this Court should consider itself bound thereby.

The traditional attitude of this Court with regard to State legislation challenged under the Fourteenth Amendment is to accord it every presumption of validity, and to resolve all doubts in favor of constitutionality, in the absence of a contrary construction by the State court. *Toombs* v. *Citizens Bank of Waynesboro*, 281 U. S. 643, 647 (1930). Mere doubt as to the constitutionality of a statute will not warrant the Court in declaring it unconstitutional; there must be something near to certainty. *Williams* v. *Baltimore*, 289 U. S. 36 (1933). A State law will not be deemed violative of the Federal Constitution if there is any reasonable principle upon which it can be sustained. *Butler* v. *Pennsylvania*, 10 How. 402 (U. S. 1850).

In other words, appellant must demonstrate with "convincing clarity" the invalidity of the challenged legislation in the light of its construction by the State court. *Corporation Commission of Oklahoma* v. *Lowe*, 281 U. S. 431, 438 (1930).

There is a total absence in the record of even an attempt by the appellant to discharge this heavy burden of proof. He offered no substantial evidence to support his claim. He barely raised the issue of the Fourteenth Amendment in his pleading (R. 9), and argued it only to the extent of one short paragraph in his brief below.

It is thus questionable whether any actual issue as to validity has been raised. But even if there has, it should, under the authorities cited, be resolved here in harmony with the discretion and interpretation of the State Legislature and the highest court of the State.

Furthermore, even if all restrictive rules were laid aside, and if this Court were to determine the question *de novo*,

it could properly reach no other result. A review of the cases in which the term "public purpose" has been considered in this Court reveals that the term has been always accorded a most elastic interpretation, capable of enlargement as the scope of governmental concern with the welfare of the people grows with the years. Its compass was expressed in *Loan Association* v. *Topeka*, 20 Wall. 655, 665 (U. S. 1874):

> "And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government * * * ."

That the free transportation of all children attending non-profit schools, in compliance with the compulsory education laws of the State, falls well within these limits is best illustrated by a consideration of the matter in relation to the police power of the State. If it is a legitimate exercise of that power, then it must be, *ipso facto*, for a public purpose.

B. *It is a Valid Exercise of the Police Power of the State.*

1. It is an aid to education.

In the field of education the State is clearly exercising its prerogative to provide for the general welfare. This Court has recognized that the promotion of literacy and the dissemination of knowledge and culture is a legitimate social aim to be achieved by the various States, and that the details of state educational programs will not be interfered with unless clearly in violation of constitutional guarantees. *Barbier* v. *Connolly*, 113 U. S. 27, 31-32 (1885); *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79, 87 (1907); *Waugh* v. *Board of Trustees*, 237 U. S. 589, 596-597 (1914); *Meyer* v. *Nebraska*, 262 U. S. 390, 402 (1923); *Pierce* v. *Society of Sisters, supra; Board of Education* v. *Barnette*, 319 U. S. 624 (1943). This recognition of education as a subject of governmental concern has been enthusiastically subscribed to by the States themselves; and the raising of educational levels occupies an important position in the social programs of most of them.

It is self-evident that the transportation of schoolchildren is a legitimate step in furtherance of those general aims. It facilitates, and therefore promotes, better attendance and better education, especially among children to whose families twenty-two cents a day is not insignificant. It would be inconsistent with the principles of our democracy to say that that facility must be denied to some, and that they must suffer a relative hardship in the exercise of their constitutional right to send their children to an accredited school of their own choosing. The State's function is to encourage and promote education—all legitimate education. That function is not confined, so far as the Federal Constitution is concerned, to the mere support of the public

schools. The aid extended by the transportation statutes is not to the school but, as stated in *Cochran* v. *Board of Education, supra,* to "education, broadly". The expenditure is to enable the child to procure an education for the benefit of the State.

That is not to say, as appellant implies, that education is (or should be) the exclusive function of the State, and that any aid extended to a child who attends any denominational or other non-public school strikes at the foundations of the Republic. The public school, as the statutes of New Jersey and the decision of this Court in *Pierce* v. *Society of Sisters, supra,* alike recognize, is not the sole medium through which the public purpose of compulsory education may be fulfilled. The private or denominational school is neither an interloper nor a late arrival on the American scene. On the contrary, it antedated the public school by nearly two centuries. It is not a necessary evil, to be granted a bare toleration because the Constitution says so. The act of parents in sending their children to such schools is not, as appellant states at page 25 of his brief, a mere "excuse for not utilizing the public facilities afforded by the State." On the contrary, the private school, equally with the public school, is an integral part of our educational system; and attendance at it is recognized as a complete fulfilment of both the letter and the spirit of the compulsory education laws.

If a State has power to enact that all children must be educated, and that education may be obtained in a private school as well as a public one—if it has power, as this Court has held, to give free textbooks to private-school as well as public-school pupils—then it is strong medicine indeed to say that it has no power at all to spend a penny of its public money to transport a single child to any but a State school.

2. It facilitates compliance with, and is complementary to, the compulsory education laws of the State.

To carry out the established public policy that every child within the State shall receive an education, the Legislature of New Jersey not only provides free transportation to and from school but also provides the services of attendance officers, at public expense. Since New Jersey law recognizes the right of the parents to a free choice in the selection of schools, transportation is made available on equal terms for both public and private-school pupils. In like manner, the attendance officers are required to pick up truants not merely from the public schools but from all schools, and to return them—not to the public school, but to that school (whether public or private) which the child is lawfully required to attend (N. J. S. A. 18:14-35).

Appellant now claims that it amounts to a waste of public funds, and to a State establishment of religion, for Ewing Township to pay 11 cents of public money to transport a willing pupil to the Cathedral High School in Trenton. If that same pupil were to absent himself without just cause, the coercive powers of the State, through its attendance officers and the police, would be employed to seize his body and to deliver him under compulsion at the doors of the Cathedral High School; and in that case the bill to the taxpayers would include not merely the transportation expenses of the pupil but the transportation expenses, and a proportionate part of the salary, of the attendance officer. If the pupil's absence were attributable to his parents, the whole judicial panoply of Court, sheriff, district attorney and jailers would be employed against them at the taxpayers' expense — all in "direct aid," as the appellant would say, of the same Cathedral High School. It is hard to see why the expenditure of public money is any less objectionable for one purpose than for the other.

The provision of free transportation, on an equal and non-discriminatory basis, makes it possible for parents to comply with the compulsory education statutes (for violation of which they are punishable), and still leaves them free to exercise their constitutional rights of choice of school. It is in aid of, and complementary to, those statutes, as the court below expressly found (R. 50-51). To the same effect, see *Nichols* v. *Henry*, 301 Ky. 434, 191 S. W. (2d) 930 (1945); *Adams* v. *County Commissioners*, 180 Md. 550, 26 A. (2d) 377, 380 (1942).

3. It promotes the health, safety and welfare of the schoolchildren of the State.

No elaborate proof is necessary to sustain the proposition that free transportation for children residing distant from their schools means less fatigue and less exposure to bad weather, and more time for rest, relaxation and study. It also means a mitigation of the dangers to life and limb to which children are subject in traveling afoot on vehicular highways. That factor alone is a sufficient reason to sustain the legislation in question. A similar statute of Maryland was challenged as violating the Fourteenth Amendment. The Maryland Court of Appeals upheld the measure as one enabling the State to protect schoolchildren from the hazards of the road. *Board of Education* v. *Wheat*, 174 Md. 314, 199 Atl. 628 (1938). See also *School District* v. *Wright*, 128 Okla. 193, 261 P. 953 (1927), and *Nichols* v. *Henry*, *supra*. All other grounds aside, the factor of physical safety alone brings this case within the proper sphere of the police power, and thus is sufficient to sustain the decision below.

C. Since the main purpose of the statute is public, it does not become unconstitutional by reason of any incidental benefit to individuals.

Appellant argues that the incidental advantage which, he claims, accrues to private schools is sufficient to defeat the public purpose of the statute. That argument finds no support in the decisions of this Court, which has consistently refused to place any such narrow restrictions upon the power of State Legislatures to provide for the general welfare. In *Noble State Bank* v. *Haskell*, 219 U. S. 104 (1911), this Court upheld the power of the State of Oklahoma under the due process clause to assess state banks for a depositors' guaranty fund; and Mr. Justice Holmes observed, at p. 110:

> "* * * we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. * * * The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. * * * there is no denying that by this law a portion of its property might be taken to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. * * * it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for, what, in its immediate purpose is a private use."

In line with that decision, the *Cochran* case upheld the use of the taxing power with respect to free textbooks as being "for a public purpose" (281 U. S. at p. 375). This Court has frequently adhered to the same principle in refusing to invalidate legislation under the Fourteenth Amendment in the face of claims that the taking is not for a public purpose because there may be some incidental advantage to a private individual or group. See *Carmichael* v. *Southern Coal Co., supra,* upholding the Alabama Unemployment Compensation Act; *Milheim* v. *Moffat Tunnel Dist.,* 262 U. S. 710 (1923), sustaining assessments upon property for the purpose of financing a public tunnel improvement, despite the fact that it was located so as to be practically part of the line of a private railroad; *Clark* v. *Nash,* 198 U. S. 361 (1905), and *Hariston* v. *Danville & Western Ry.,* 208 U. S. 598, 608 (1908), holding valid the condemnation of property as for a public purpose, despite substantial collateral advantages to individuals. The same principle has been applied in State court decisions upholding free transportation statutes of other states,—notably *Nichols* v. *Henry, supra,* quoted *infra,* p 36.

III

The New Jersey Statute does not constitute an establishment of religion.

Appellant's attack on the New Jersey legislation has a two-fold aspect. He urges, *first,* that it amounts to a deprivation of property without due process of law because private property is, he claims, taken for a private purpose. He urges, *second,* that it amounts to an establishment of religion. Under his first contention, he relies directly upon the Fourteenth Amendment. Under the second, he relies upon the First Amendment, as incorporated by implica-

tion in the Fourteenth. The two contentions, as applied to the facts of this case, necessarily overlap, since his basic argument is that public moneys are being misapplied to an unlawful purpose—namely, the support of private institutions, some of which have a religious character.

Appellant's claim with respect to the First Amendment is in the nature of an afterthought, since he did not even mention it in his brief below. His only argument below on the Federal question was based on the claim, now abandoned, that the New Jersey statute was unconstitutional because it discriminated against private schools operated for profit. The argument based on the First Amendment is, however, now advanced in his brief here, and reiterated in the briefs of the *amici curiae* who have entered the lists on his behalf.

The First Amendment has a "double aspect." *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940). It condemns legislation (i) respecting "an establishment of religion," and (ii) prohibiting the "free exercise" of religion. By its terms it is a prohibition on Congress alone. The "free exercise" provision at least, by decisions of this Court, has become, *via* the Fourteenth Amendment, a prohibition on the States as well. *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Davis* v. *Beason*, 133 U. S. 333 (1890); *Reynolds* v. *United States*, 98 U. S. 145 (1878).

The statute here involved makes no mention of any religion and "establishes" none. With the sole (and reasonable) exception of schools operated for profit, it applies equally to all schoolchildren and all schools of the State. Another provision of New Jersey law (N. J. S. A. 18:19-7) defines a "private school" broadly as "a school, attendance at which is a sufficient compliance with the compulsory education requirements contained in the State statutes." The transportation statute is for the benefit of all children

attending schools in compliance with the compulsory education laws of the State, whether those schools be public or private.

Some private schools may be denominational. Others may not. So long as a school imparts instruction "equivalent to that provided in the public schools" (N. J. S. A. 18:14-14) and is not operated for profit, parents are entitled to have their children transported to it at public expense, regardless of whether the school is operated by any denomination or by none.

The argument of appellant, and of the *amici curiae* on his side, starts with a fundamental confusion between the term "an establishment of religion" and the term "a religious establishment." Based upon that confusion, they argue that because some of the private schools whose pupils receive free bus rides might be called "religious establishments," it is therefore unconstitutional to take any steps to help any pupils travel to any private schools at all.

As pointed out by Mr. Justice Peckham in *Bradfield* v. *Roberts*, 175 U. S. 291, 297 (1899) "an establishment of religion" is by no means synonymous with "a religious establishment." In that case this Court upheld the validity of a Congressional grant of money to a non-profit hospital operated by a Roman Catholic religious order in the District of Columbia, against the challenge that that grant promoted the establishment of a religion. The hospital, a corporate (and therefore non-denominational) entity, was deemed to be the primary beneficiary, and the First Amendment was thus held not to prohibit collateral benefits to religion where the main purpose of the legislation is public in character.

To the proposition, so earnestly advanced both by appellant and by the *amici curiae* who have filed briefs on his behalf, that the separation of Church and State is a funda-

mental principle of our government, we whole-heartedly agree. No one would wish it otherwise. But it does not follow from this, as appellant implies, either that the two are irretrievably committed to perpetual hostility, or that when the interests of both happen to coincide, the Constitution requires that the interests of both should be either ignored or frustrated.

The Founding Fathers took no such view when they wrote into the Northwest Ordinance of 1787:

> "Article III. Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged * * *"

Nor did this Court take such a view when it declared in *Pierce* v. *Society of Sisters* (*supra*, p. 2) that "the child is not the mere creature of the state", or when it upheld the Louisiana school-book statute in *Cochran* v. *Board of Education* (*supra*, p. 6). Nor did the Supreme Court of Mississippi, when it upheld a similar school-book statute, saying (*Chance* v. *Mississippi State Text-book Rating and Purchasing Board*, *supra*, 200 So. 706, 709-710):

> "Useful citizenship is a product and a servant of both the church and the state, and the citizen's freedom must include the right to acknowledge the rights and benefits of each, and to import into each the ideals and training of the other.
>
> "There is no requirement that the church should be a liability to those of its citizenship who are at the same time citizens of the state, and entitled to privileges and benefits as such. Nor is there any requirement that the state should be godless or should ignore the privileges

and benefits of the church. Indeed, the state has made historical acknowledgment and daily legislative admission of a mutual dependence one upon the other.

"It is the control of one over the other that our Constitution forbids. Sections 18, 208. The recognition by each of the isolation and influence of the other remains as one of the duties and liberties, respectively, of the individual citizen. It is not amiss to observe that by too many of our citizens the political separation of church and state is misconstrued as indicating an incompatibility between their respective manifestations, religion and politics. The state has a duty to respect the independent sovereignty of the church as such; it has also the duty to exercise vigilance to discharge its obligation to those who, although subject to its control, are also objects of its bounty and care, and who regardless of any other affiliation are primarily wards of the state. The constitutional barrier which protects each against invasion by the other must not be so high that the state, in discharging its obligation as parens patriae, cannot surmount distinctions which, viewing the citizen as a component unit of the state, become irrelevant.

"The religion to which children of school age adhere is not subject to control by the state; but the children themselves are subject to its control. If the pupil may fulfill its duty to the state by attending a parochial school it is difficult to see why the state may not fulfill its duty to the pupil by encouraging it 'by all suitable means.' The state is under duty to ignore the child's creed, but not its need."

Appellant's fundamental misconception of the purpose of the New Jersey legislation, and of the issue in this case,

is perhaps best shown by the following statement made at page 26 of his brief:

> "There is no reason why children should not attend a public school nor any reason why they should not be compelled so to attend *except their freedom of choice in the matter of religion* which extends to schools in connection with religion. But to say that the parents may not only be *excused* from sending their children to the public schools but shall be paid for exercising this choice is extending religious liberty beyond anything heretofore suggested * * *." (Italics ours).

The vice inherent in this quotation pervades the briefs of the *amici curiae* who have joined with the appellant. To talk of parents being "excused" from sending their children to the public schools and being "paid for exercising this choice" betrays confusion of thought.

Parents are not "excused" from sending their children to the public schools. They are under no obligation to do so; and no "excuse" is needed. In the case at bar no payment was made to the parents for "exercising a choice" between the public and the private schools.

Throughout appellant's argument there is implicit the idea that education and everything connected with it are the prerogative of the State and that "excuses" and "exemptions" from public school attendance should be narrowly construed and are granted only because of religious scruples.

In *Pierce* v. *Society of Sisters, supra,* this Court disposed of any such idea when it declared broadly that no government in the Union had any power "to standardize its children by forcing them to accept instruction from public teachers only" (268 U. S. at p. 535).

The fundamental liberty recognized in that case is parental liberty, not religious liberty. The paramount right of the parent to decide how his child is to be educated is not restricted to a choice in matters of religion only (*Meyer* v. *Nebraska, supra*); nor does the New Jersey statute impose any such restriction. A parent who sends his child to the school of his choice, whether religious or non-religious, is performing his legal duty and exercising his constitutional parental rights, rather than his religious rights. Under New Jersey law, and under the Constitution, the parent has as much right to send his child to a non-denominational private school in which no religious teaching is given as he has to send him to any other school, public or private. He may choose the school because he likes the teacher, or because he prefers its instruction in manual training or foreign languages, or for any other reason which appeals to him as a parent. Provided only that the school (whatever it is) meets the requirements imposed by statute, the parent in any such case has fully discharged his duties under the law and is as much entitled to reimbursement for transportation as are any of the appellee parents in the case at bar.

The existence of private schools (some of them religious and some of them not) during the entire period from the adoption of the Constitution to the present has never been deemed dangerous to our liberties*. The right of the

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* The arguments of William D. Guthrie, Esq. in *Pierce* v. *Society of Sisters* (summarized in 268 U. S. at pp. 514 and 515) are most pertinent:

"Private and religious schools have existed in this country from the earliest times. Indeed, the public or common school, as we know it today, dates only from 1840. For generations all Americans—including those who fought for liberty and independence in the eighteenth century, and who drafted the Declaration of Independence, the Northwest Ordinance of 1787, and the Constitution of the United States—were educated in private or religious schools, and mostly the latter. Perhaps no

parents, *as parents,* to choose such schools needs no "excuse" or "exemption." Appellant's argument that the payment of bus transportation to all parents, on an equal and non-discriminatory basis, amounts to a union of Church and State because some parents may send their children to religious schools, finds no basis either in logic or in the statute here under attack.

Properly stated, the question in the present case is

> Does a grant of free bus transportation to *all* school children amount to legislation respecting "an establishment of religion" simply because children attending non-public schools (some of which are denominational) are not excluded from the grant?

If the legislation in question had declared that only children of a particular denomination might ride free, while all others must walk or pay their own way, there would be some force to appellant's claim. But it did not. Like the textbook legislation in *Cochran* v. *Board of Education,* (*supra* p. 9):

> "Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

But, says the appellant, the legislation also benefits, at least incidentally, the school as well as the child; and since

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institution is older or a more intimate part of our colonial and national life than religious schools and colleges, both Catholic and Protestant. The private and religious schools have been the laboratories in which educational methods have been worked out and pedagogic progress accomplished from the very beginning of our history. Out of them have developed, or to them is due, our greatest colleges and universities, the most important of them to this day being private or religious institutions."

(in the case of some of the schools covered by the statute) a part of the curriculum may be devoted to religious instruction, the legislation indirectly benefits religious institutions, and is therefore void in its entirety.

Under the policy of New Jersey, as of other States, private schools, whether denominational or not, receive a very direct pecuniary advantage through exemption from local taxes—granted on the theory that they exist for the public benefit and perform a public function. Yet notwithstanding that exemption, they are protected, like their neighbors, by tax-supported fire and police departments and a host of other public services, without any question raised of the "establishment of religion."

As compared with the very direct pecuniary benefits which accrue from the policy of tax exemption, let us see just what "benefits" a denominational or other non-public school may be said to obtain from the transportation statute here involved. Under that statute, the school's expenses are not reduced a penny, nor is a penny added to its income. It receives no services or equipment or supplies. The bus-stop sign on the street corner marks also the limit of the public expense. Wherein, then, has the school profited? Do students attend in greater numbers than they would if their parents were forced to send them elsewhere or nowhere in order to avoid the transportation expense? This may be, though the record is barren of evidence on that score. Do the enrolled students attend more regularly? Possibly. Are they better fitted for study when they arrive, and do they thus lighten the task of instruction? Undoubtedly. The conclusion nevertheless remains the same—that private or religious interests are advanced by this legislation only to the extent that they coincide with, and are part of, the public interest. The benefits, if any there be,

to the denominational or private schools are not only abstract and relatively minor; they are also purely incidental and unavoidable.

Appellant's argument on the "benefit" theory was thus answered in a recent decision of the Court of Appeals of Kentucky, upholding the constitutionality of a statute similar to that here involved, (*Nichols* v. *Henry, supra*), in which it said (191 S. W. (2d) at pp. 934-935):

> "In this advanced and enlightened age, with all of the progress that has been made in the field of humane and social legislation, and with the hazards and dangers of the highway increased a thousandfold from what they formerly were, and with our compulsory school attendance laws applying to all children and being rigidly enforced, as they are, it cannot be said with any reason or consistency that tax legislation to provide our school children with safe transportation is not tax legislation for a public purpose. Neither can it be said that such legislation, or such taxation, is in aid of a church, or of a private, sectarian, or parochial school, nor that it is other than what it is designed and purports to be, as we have stated hereinabove—legislation for the health and safety of our children, the future citizens of our State. The fact that in a strained and technical sense the school might derive an indirect benefit from the enactment, is not sufficient to defeat the declared purpose and the practical and wholesome effect of the law."

It would be difficult indeed to draft a police-power statute, however broad its scope, which would not in its operation redound to the incidental benefit of some particular classes or groups but which would benefit directly each

and every individual citizen in exactly the same manner and extent. State agricultural services directly benefit only the farmers. Workmen's compensation and social-security acts discriminate against those who enjoy inherited incomes in favor of those who do not. The very policy of free compulsory education favors the poor and prolific at the expense of the rich and childless. The simple fact is that as the State does its part to lessen the respective peculiar problems of the various constituent groups of the community, so fares the common weal. Allocation of direct benefit is thus a poor criterion of constitutionality. The far better test is whether the principal and ultimate effect of a law is to promote the general welfare. If it does, the benefits, whether direct or incidental, may fall where they will.

Who, then, are the overall beneficiaries of this free transportation program? Primarily, the State itself profits greatly from this measure. As already mentioned, the fostering of juvenile education and the partial solution of the public safety problem are among the achievements. There is also the result, as found by the court below (R. 50-51), that the providing of universal free transportation aids in the enforcement of the compulsory education laws. The State must be conceded the power to enact one set of laws reasonably calculated to insure compliance with another admittedly valid set.

Secondly, there are the children themselves, who form an integral class in the community and for whose benefit specific legislation is unquestionably permissible. The assistance to them, in all its phases, has been already set forth.

Finally, the parents of the children concerned are compensated directly. Parents form an interest group of considerable size, especially when composed of all parents en-

joying the use of non-profit schools. A cash reimbursement to them is not an inappropriate assistance, where the final cost of discharging legal duty must, in many cases, loom large.

Such are the real beneficiaries of this program. Their benefits are real. Their relative importance in the community is great.

The sum of these fractional participations represents, not unnaturally, a substantial, if less specific, benefit to the community as a whole. It consumes the loaf; there remain only the crumbs—namely, the alleged incidental benefits claimed to accrue to such of the non-public schools as happen to be denominational. The possibility of such benefits cannot render the statute unconstitutional.

In our discussion thus far we have accepted, *arguendo*, appellant's argument that aid to a school is the same as aid to a church, or, as was said in the dissent below (R. 62), that "parochial schools are a part of the ministration of the church under whose control they are." That argument is a misleading distortion of the truth. While it is perfectly true that most denominational schools teach the religious tenets of their denominations as part of the curriculum, those schools are something more than mere adjuncts of the church with which they may be affiliated. They are also (and primarily) educational institutions recognized and approved by the State* as taking a full and legitimate part

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* The New Jersey statute (N. J. S. A. 18:19-7) defines a private school as "- school, attendance at which is a sufficient compliance with the compulsory education requirements contained in the state statutes."

Various sections of the New Jersey Education Law apply specifically to private schools, e.g. N. J. S. A. 18:19-1 (prohibiting corporal punishment), 18:19-2 to 19-9, inclusive (prescribing regular courses of study in accident prevention, fire prevention, and the Constitution of the United States), 18:3-8 (requiring annual reports to the State Commissioner of Education), 18:20-8 (requiring private schools, as a condition precedent to confering degrees, to submit to conditions prescribed by the State Board of Education).

in the program of compulsory education, and engaged in the task of helping parents to perform a duty laid upon them, under criminal sanctions, by State law.

Appellant necessarily assumes that if a religious denomination operates an institution devoted primarily to extra-religious purposes, then any benefit to that institution is *per se* an aid to the establishment of religion. That line of argument was rejected by this Court in *Bradfield* v. *Roberts* (*supra*, p. 29), where a cash grant by Congress to a hospital operated under the exclusive auspices of the Roman Catholic Church was held not to be in violation of the First Amendment. There is no reason why an otherwise valid police-power statute should stand discredited on the ground that it may remotely and incidentally encourage all believers in their adherence to their respective creeds.

Our position on this point has been sustained in all previous cases where this Court has had occasion to deal with the aid-to-religion question under either the First or Fourteenth Amendments. In addition to *Bradfield* v. *Roberts* and *Cochran* v. *Board of Education, supra*, *Quick Bear* v. *Leupp*, 210 U. S. 50 (1908), upheld the disbursement of Indian Educational funds, of which the Government was trustee, to the Bureau of Catholic Indian Missions, over the protest that it constituted the use of money in furtherance of a religion, and despite the fact that obvious collateral advantages would accrue to the religious denomination concerned. Appellant fails to cite a contrary holding, as revealed by a consideration of the authorities collected by him.

In his argument on the religious issue below (which he urged under the State Constitution only), appellant cited six State Court decisions adverse to legislation of the type here involved. All of them were cited in the dissent below (R. 55-58); all of them reappear in one or more of the briefs in

support of appellant's claims here. In none of those cases did the State Courts attempt to interpret or apply any Federal constitutional limitations. All of them turned on the interpretation of local constitutional or statutory provisions. None of them, we submit, has any application to the issue here. Of the six States involved, it is interesting to note that three have subsequently granted transportation privileges to private-school pupils, in one case by constitutional amendment, in another by a subsequent court decision which distinguished and limited the earlier case relied on by appellant, and in the third by a new statute, the validity of which is currently in litigation.

The six decisions referred to, arranged chronologically, are as follows:

1. *State ex rel Van Straten v. Milquet*, 180 Wis. 109, 192 N. W. 392 (1923).

The statute in question (Wisconsin Laws of 1921, Sec. 40.16, subd. 1(c)) provided that if any local district suspended its public school, it must pay for the tuition of children in some adjoining district, and must provide transportation "to and from school" during the period of suspension. The court decided merely that that statute contemplated transportation to adjoining public schools only, and that under its provisions a local board had no authority to make a contract to transport children to a nearby parochial school.

The statute was later amended to provide that when a local public school was closed, the district must pay for the tuition of those children who attended adjacent public schools, and must provide transportation for *all* children who resided more than two miles from "the nearest school which they may attend" (Wisconsin Laws of 1939, Sec.

40.34 (1) and (2)). The amendment was held by the Circuit Court of Chippewa County (*Rutz* v. *Marek*, unreported, decided in 1941) to authorize the transportation of parochial-school children. Its validity was sustained by that Court against attack under the Wisconsin Constitution, which prohibits sectarian instruction in the public schools (Art. X, Sec. 3) and provides (Art. I, Sec. 18):

> "* * * nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

After the decision in *Rutz* v. *Marek*, Sec. 40.34 (2) of the Wisconsin Laws was again amended by Wisconsin Session Laws, 1943, Ch. 526, Sec. 1. The amendment struck out the reference to children residing more than two miles from "the nearest school which they may attend" and substituted a reference to children residing more than two miles "from the nearest *district school or federal school* which they may attend."

In *Costigan* v. *Hall*, 23 N. W. (2d) 495 (decided June 22, 1946, not yet officially reported), the Supreme Court of Wisconsin held that under this amendment to the statute the transportation of parochial-school pupils was unauthorized. It also held that in the particular case before it the school district was not authorized to transport *any* pupils, public or private. Although requested by counsel for both sides to decide the case on constitutional grounds, the court declined to do so.

At the forthcoming election of November 1946 the voters of Wisconsin will pass upon a constitutional amendment reading as follows:

> "(Article X) Section 3. The legislature shall provide by law for the establishment of district schools,

which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein, *except that such prohibition shall not bar the legislature from providing for the transportation of children to and from any school or institution of learning.*" (The amendment adds the italicized words.)

2. *State ex rel Traub* v. *Brown*, 36 Del. 181, 172 Atl. 835 (1934).

In this case the Legislature (Delaware Laws, Vol. 38, ch. 142) appropriated $5,000 for the purpose of transporting pupils "attending daily free schools supported by any church or religious society and located outside of the city of Wilmington." The Superior Court, New Castle County, held the appropriation unconstitutional under a provision of the State Constitution which prohibited appropriations "in aid of any sectarian, church or denominational school". (Del. Const., Art. X, Sec. 3). On writ of error, the Supreme Court of the State did not pass on the merits, but dismissed the case as moot (39 Del. 187, 197 Atl. 478 (1938)), on the ground that the appropriation in question had been made available only for a limited time, and that that time had expired pending the appeal.

3. *Judd* v. *Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576 (1938).

In 1936 the New York Legislature provided in substance that whenever a school district furnished transportation for public-school pupils, it must furnish equal facilities for private and parochial school pupils (N. Y. Laws of

1936, ch. 541, amending Sec. 206 of the Education Law). The Court of Appeals*, by a 4 to 3 decision, held this legislation unconstitutional under a provision of the State Constitution which said:

> "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, *directly or indirectly*, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught." (N. Y. Constitution, Art IX, Sec. 4, since renumbered and now embodied in Art. XI, Sec. 4.) (Italics ours.)

The majority opinion held that the furnishing of transportation is exactly on a par with the furnishing of textbooks (an interesting point, in view of this Court's decision in *Cochran* v. *Board of Education*, *supra*), and that both are equally illegal because they tend to aid, or "promote the interests of" the school. Considerable reliance was placed on the words "directly or indirectly" in the Constitutional provision quoted above.

A vigorous dissenting opinion was written by Chief Judge Crane, in which he said (278 N. Y. at p. 220; 15 N. E. (2d) at p. 586):

> "Having made attendance upon instruction compulsory and having approved of attendance at certain

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* The Supreme Court, Nassau County, had sustained the constitutionality of the legislation (*Judd* v. *Board of Education*, 164 Misc. 889) and had been unanimously affirmed, without opinion, by the Appellate Division, Second Department (253 App. Div. 907).

schools other than public schools, the Legislature determined that the inhabitants of the district should have the power, under certain conditions, to provide for the transportation of the pupils to and from the schoolhouse in the district or the school which they legally attend. The object of such legislation is apparently to insure the attendance of the children at their respective schools for the requisite period of instruction and, perhaps, to safeguard the health of the children. The statute is not designed to aid or maintain the institutions themselves. Recognizing the right of the children to be sent to such schools, and enjoining upon them the duty of regular attendance, the Legislature gave the authorities power, in a proper case, to assist the children in getting to their school. The law says to the children and parents: Having chosen a proper school, you must attend regularly. The school district has been given the power to add to that: Where necessary, we shall assist you in getting there."

The decision in *Judd* v. *Board of Education* was delivered in May 1938. In November of that same year the voters of New York amended their Constitution to overcome the effect of that decision, by adding at the end of the constitutional provision quoted *supra*, p. 43, the following:

"• • • but the legislature may provide for the transportation of children to and from any school or institution of learning." (N. Y. Const. Art. XI, Sec. 4.)

Under that amendment New York now provides equal transportation facilities to all schools, public and private

(N. Y. Education Law, Section 206 (18) and 503, added by Laws of 1939, ch. 465).

4. *Gurney* v. *Ferguson*, 190 Okla. 254, 122 P. (2d) 1002 (1941), cert. den. 317 U. S. 588 (1942).

Ch. 34, Oklahoma Session Laws of 1939, provided, like similar statutes in several other states, that private and parochial school children should be entitled to transportation on the regular public-school bus routes. The Supreme Court of Oklahoma held that law unconstitutional under Art. II, Sec. 5, of the Oklahoma Constitution, which provides:

> "No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such."

The decision was based largely on the majority opinion of the New York Court of Appeals in *Judd* v. *Board of Education, supra.*

The plaintiffs (parents of private-school children), who had initiated the litigation, and who had been unsuccessful in the Oklahoma Supreme Court, thereupon appealed to this Court. The appeal was dismissed for lack of jurisdiction; and this Court, treating the appeal as a petition for certiorari, denied the petition (317 U. S. 588; rehearing denied 317 U. S. 707 (1942)).

The dissenting opinion in the Court of Errors and Appeals of New Jersey in the case at bar (R. 53-4), and the

brief of the appellant here (p. 18) make some point of that denial. The denial of a petition for certiorari is, of course, not equivalent to a decision on the merits (*Atlantic Coast Line R. Co.* v. *Powe*, 283 U. S. 401 (1931); *U. S.* v. *Carver*, 260 U. S. 482 (1923)); and in *Gurney* v. *Ferguson* there appears to have been no Federal question for this Court to review.

5. *Sherrard* v. *Jefferson County Board of Education*, 294 Ky. 469, 171 S. W. (2d) 963 (1942).

Ch. 66 of the 1940 Acts of Kentucky provided that private-school pupils should receive the same transportation privileges as public-school pupils. The Court of Appeals of Kentucky, relying on *Judd* v. *Board of Education, supra,* and *Gurney* v. *Ferguson, supra,* held that Act unconstitutional under various sections of the Kentucky Constitution relating to the common-school fund. The basis for the decision was that that fund was earmarked by the Constitution for public schools only, and that no payment could be made out of it for any other purpose.

Two years after that decision, the Kentucky Legislature enacted another law (Ch. 156 of the 1944 Acts), reciting that the health and safety of all children were endangered by walking along the highways to and from school, and providing that the various counties might furnish transportation out of their general funds (and not out of funds specifically earmarked for education) to all children living beyond reasonable walking distance from their respective schools and where there were no sidewalks upon which they might travel. The constitutionality of the new Act, as applied to private-school pupils, was unanimously sustained by the Kentucky Court of Appeals in *Nichols* v.

Henry, supra. The earlier decision in *Sherrard* v. *Jefferson County Board of Education* was distinguished on the ground that it held merely that public-school funds could not be used for the transportation of children attending private schools.

6. *Mitchell v. Consolidated School District No. 201*, 17 Wash. (2d) 61, 135 P. (2d) 79 (1943).

Chapter 51 of the 1941 Laws of Washington, like the statutes in several other States, provided that private and parochial school children should be entitled to free transportation along the regular public-school bus routes. The Supreme Court of Washington, by a closely-divided vote, held the Act unconstitutional under the following provisions of the State Constitution:

Art. 9, §2:

> "The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund, and the state tax for common schools, shall be exclusively applied to the support of the common schools."

Art. 9, §4:

> "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

Art. 1, Sec. 11:

"No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment."

Of the nine Justices sitting, four held the legislation unconstitutional under all of the provisions quoted. Another Justice concurred in the result, but stated that there was no objection to the use of public funds (other than the common-school fund) to transport pupils to *non-sectarian* private schools. The remaining four Justices dissented, deeming the legislation constitutional in its entirety.

It should be noted that all of these six decisions, with the exception of *State ex rel Van Straten* v. *Milquet* (*supra*, p. 40), which involved merely a question of statutory construction, turned on the interpretation of State Constitutions which prohibited, in various rather specific forms, the appropriation of funds in aid of denominational institutions. In this connection it is not amiss to point out that the language of those State Constitutions was considerably more restrictive than that of the First Amendment, which prohibits merely legislation "respecting an establishment of religion". So far as the Federal Constitution is concerned, there is no reason for striking down a State statute which, like the Louisiana school-book statute, extends aid impartially to all children alike, including those who happen to attend denominational schools. And even with respect to the interpretation of the State Constitutions involved, the arguments on the other side (as exemplified by the dissent in *Judd* v. *Board of Education*, *supra*, p. 43) merit close consideration.

The six cases cited by appellant do not represent the whole law on the subject. As against them, the courts

of at least five States beside New Jersey have squarely sustained the constitutionality of either school-book or transportation legislation for the benefit of private-school pupils, under similar constitutional provisions of the States, and in some cases under the Fourteenth Amendment as well.

In addition to the decisions in Louisiana (affirmed by this Court) and in Mississippi sustaining the constitutionality of free textbook legislation,* the following cases have sustained the validity of transportation statutes similar to that of New Jersey:

Board of Education of Baltimore County v. *Wheat*, 174 Md. 314, 199 Atl. 628 (1938).

In this case the Court of Appeals of Maryland sustained a statute which provided that all children who attended schools in Baltimore County which did not receive State aid and who resided on or along or near public highways on which public-school buses were operated should be entitled to transportation on those buses. The Court rejected arguments of unconstitutionality based not only on the State Constitution but also on the Fourteenth Amendment, saying (199 Atl. at 632):

> "Starting with the interest which the state is acknowledged to have in seeing that all children of school age acquire an education by attending some school, and the fact that they are complying with the law in going to such a school as the parochial school involved in this case, their accommodation in the buses appears to the court to be within the proper limits of enforcement of the duty imposed. Compliance having been

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* *Cochran* v. *Louisiana State Board of Education*, *supra*, page 8; *Chance* v. *Mississippi State Textbook Rating and Purchasing Board*, *supra*, page 11.

made dangerous in a much greater degree, removal of the danger to any extent would seem to be within the same public function."

Adams v. *County Commissioners of St. Mary's County*, 180 Md. 550, 26 A. (2d) 377 (1942).

In that case a local act of the Maryland Legislature required the Commissioners of St. Mary's County to levy and appropriate $10,000 annually "for the transportation to and from school of children attending schools in St. Mary's County not receiving aid from the State". The local authorities carried out the statutory mandate by making direct cash grants to parochial schools to enable them to operate their own school buses. The Court of Appeals of Maryland, affirming its earlier decision in *Board of Education* v. *Wheat, supra*, sustained the constitutionality of the statute and of the action of the local authorities, under both the Maryland Constitution and the Fourteenth Amendment.

Nichols v. *Henry*, 301 Ky. 434, 191 S. W. (2d) 930 (1945).

This case has already been cited *supra*, pp. 25, 36. In it the Court of Appeals of Kentucky sustained the validity of a statute which authorized appropriations for the transportation of all pupils attending school "in compliance with compulsory school attendance laws."

Bowker v. *Baker*, 167 P. (2d) 256 (California District Court of Appeals, March 26, 1946, not yet officially reported). In this case the court sustained a statute authorizing school boards to give to pupils "in attendance at a school other than a public school" transportation "upon the same terms and in the same manner and over the same routes of travel" as public-school pupils. The California Constitution (Art. IV, §30) contained the usual provisions against appropriation in aid of sectarian institutions, but

those provisions were held not infringed by the statute in question. The Court stated (167 P. (2d) at 262):

> "When we consider the complexities of our modern life we realize that many expenditures of public money give indirect and incidental benefit of denominational schools and institutions of higher learning. Sidewalks, streets, roads, highways, sewers are furnished for the use of all citizens regardless of religious belief. No one has yet challenged the right of any law abiding citizen to travel to a school over a highway built with public funds because of his religious beliefs or because he is attending a denominational institution, yet to paraphrase the expression used in *Judd* v. *Board of Education, supra,* without roads over which pupils could reach the school there would be no school. Police and fire departments give the same protection to denominational institutions that they give to privately owned property and their expenses are paid from public funds. If St. Anne's Parochial School caught fire would the plaintiff argue that the Porterville fire department responding to the call should stand by idle until the flames spread to privately owned buildings before attempting to extinguish the conflagration because the cost of the fire-fighting equipment and the salaries of the firemen are paid by funds raised by general taxation?"

The reasoning behind all of these cases is the same as that already advanced in this brief, and in exact parallel to that laid down by this Court in *Cochran* v. *Board of Education*—namely, that the education of all children is a public purpose, that the protection of all children from the dangers of the highway is likewise a public purpose, that

aiding all children to get to school is therefore a public purpose, and that any remote or incidental advantage or benefit which may accrue to the school which he attends does not render the legislation unconstitutional.

In addition to the States involved in the decisions listed above, a substantial number of other States have similar legislation now on their books. All of it is necessarily under attack in the present litigation. Under the next point we shall summarize that legislation, and give some indication of the extent to which appellant's claims must go.

IV

A decision holding the New Jersey Statute unconstitutional would strike down similar legislation in at least fifteen other States, would cast doubt upon the validity of several Acts of Congress, and would forever disable all of the States from legislating with respect to the transportation of children other than those attending public schools.

A. *State Legislation.*

In Appendix A to this brief (*infra*, p. 61) we have summarized the present status of school bus legislation in all of the States and the District of Columbia, with references to applicable decisions of the courts and of the State Attorneys General. A brief summary of the situation is as follows:

Sixteen States and the District of Columbia have legislation which authorizes or requires, in one form or another, transportation for private-school pupils (California, Dis-

trict of Columbia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, New York, Oregon and Rhode Island). Of these, the legislation has been sustained as constitutional by the courts in *four* (California, Kentucky, Maryland and New Jersey) and by opinions of the Attorneys General in *six* (Indiana, Louisiana, Massachusetts, Michigan, Missouri and New Hampshire). In Louisiana free textbook legislation for the benefit of private-school pupils has been sustained, under both the State and Federal Constitutions, by the Courts of the State and by the Supreme Court of the United States. In New York the transportation provision was embodied in a constitutional amendment to overcome a 4 to 3 decision of the Court of Appeals invalidating an earlier statute.

Two States have statutes susceptible of interpretation in favor of private-school pupils, and opinions of their Attorneys General that the statutes are to be construed in their favor (Colorado and Minnesota).

One State (Mississippi) has a transportation statute which is susceptible of an interpretation in favor of private-school pupils but which has not been officially construed, and a free textbook statute applicable to private-school pupils which has been sustained as constitutional.

Three States (Maine, North Dakota and South Dakota) have statutes susceptible of interpretation in favor of private-school pupils, but local rulings adverse to those pupils (Opinions of Attorneys General in Maine and North Dakota; implication from court decision in South Dakota.)

Eight States have statutes susceptible of interpretation in favor of private-school pupils, with no official ruling either way (Arizona, Arkansas, Connecticut, Nevada, Utah Vermont, West Virginia and Wyoming). Under local practice, at least three of these are reported to be currently

furnishing transportation to private-school pupils (Connecticut, Ohio and West Virginia).

Fourteen States, either by the specific language of their statutes, or by necessary implication, appear to provide for public-school pupils only (Alabama, Delaware, Florida, Georgia, Idaho, Nebraska, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee and Virginia). In two of these the legislatures have attempted to provide for private-school pupils as well, but have been blocked by local decisions under the State Constitutions (Delaware and Oklahoma).

In *four States* the situation is currently unsettled as follows:

Iowa—Statute ambiguous, conflicting opinions of Attorneys General, and litigation pending.

Texas—Statute ambiguous and litigation pending.

Washington—Statute specifically provides for private-school children. Prior statute held unconstitutional under State Constitution. Litigation pending on present statute.

Wisconsin—Statutes several times amended, with varying decisions as to construction. Constitutional issue argued but not decided in latest case. Constitutional amendment authorizing transportation of private-school pupils to be voted on in November 1946.

As the foregoing summary indicates, the unmistakable trend of legislative policy has been in the direction of affording equal transportation facilities to all pupils attending school in obedience to the compulsory education laws of the State, regardless of what school they may attend. More and more legislatures have recognized the necessity, from

the standpoint of health and safety, of getting children off the highways, and the justice of affording equal treatment to all classes covered by the compulsory education laws. The parents of non-public school pupils, after all, contribute like everyone else their equal share of taxes; it is certainly not unfair that they should share, where possible, in direct expenditures made therefrom.

The New Jersey statute here under attack is not an isolated instance of action by a single State legislature. On the contrary, it represents a deliberate attempt to deal with a local need and to solve a local problem, in accordance with the trend of legislation elsewhere and in accordance with enlightened present-day ideas of the duties of the State. If that statute is invalid under the Fourteenth Amendment, as appellant claims, then all similar statutes in other States are equally invalid.

By the same token, if it is unconstitutional under the Fourteenth Amendment to spend the taxpayers' money to send a child to a parochial school, it is equally unconstitutional to spend the taxpayers' money to furnish that child with textbooks and school supplies for use at the same school. Yet free textbook legislation, bearing the stamp of this Court's unanimous approval under the Fourteenth Amendment, is now on the books of at least six states (*supra*, pp. 10-11).

Such is the result to which appellant's arguments necessarily lead. We submit that those arguments have no basis under either the First or the Fourteenth Amendments, and that the States should be left free to handle the problem in accordance with sound reasoning and their own enlightened judgment as to local needs.

B. *Federal Legislation.*

Appellant's claims do not stop with an attack on the legislation of the many States whose public policy is similar to that of New Jersey. If appellant is correct, the Congress of the United States has over and over again violated the prohibitions of the First and Fifth Amendments by extending aid to denominational institutions or their pupils; and a whole series of Acts of Congress become of very doubtful validity.

Specific instances where the validity of such items of Federal legislation has been sustained by this Court are cited *supra* at page 39. In addition, attention may be directed, by way of illustration, to the following items of current Federal legislation:

The National School Lunch Act (Act of June 4, 1946, C. 281, 60 Stat. , 42 U. S. C. §§1751-1760) authorizes the grant of Federal funds to States to provide lunches to students of public and non-profit private schools alike. The Act provides that

> "• • • if, in any State, the State educational agency [administering the school-lunch program] is not permitted by law to disburse the funds paid to it under this Act to nonprofit private schools in the State or is not permitted by law to match Federal funds made available for use by such nonprofit private schools,"

the Federal Government

> "shall disburse the funds • • • directly to the nonprofit private schools within said State for the same purposes and subject to the same conditions • • • " (42 U. S. C. §1759)

The statute provides for furnishing the schools themselves with equipment used "in storing, preparing or serving food," as well as with food (42 U. S. C. §). Pupils in private and denominational schools are now receiving the benefits of this Act.

The Servicemen's Readjustment Act of 1944 (Act of June 22, 1944, C. 268, Title II §400 (a), 58 Stat. 287, 38 U. S. C. §701 (f) provides that every honorably discharged veteran of World War II shall be entitled to such course of education as he may elect at any approved educational institution, public or private, at which he chooses to enroll. The Federal Government pays directly to the educational institution selected by the veteran, the cost of tuition and such laboratory, library, health, infirmary and other similar fees as are customarily charged, as well as books, supplies and equipment under this Act veterans are now attending numerous private and denominational schools and colleges.

In the Act of February 25, 1931, C. 302, 46 Stat. 1419, Congress provided for reduced street-car and bus fares for "school children not over eighteen years of age, going to and from school" in the District of Columbia. When the bill originally passed the House of Representatives it provided reduced fares for only those pupils "going to and from public schools" (H. R. 12571, 71st Cong. 2nd Sess.). The Senate amended the Bill to include all schoolchildren (Sen. Report 1210, 71st Cong., 3rd Sess.; Cong. Record, Vol. 74, pp. 1078, 4488) and the bill was enacted as so amended. Subsequently, by Act of January 14, 1933, C. 10, §1, par. 19, 47 Stat. 759, Congress, in approving a unification program for the District of Columbia street-car and bus companies, provided that there should be a reduced fare "for schoolchildren not over eighteen years of age, going to and from public, parochial or like schools in the

District of Columbia." All schoolchildren of the District of Columbia, whether attending public or private schools, now ride the street cars and buses at the same reduced rate.

The foregoing Acts of Congress demonstrate that the Congress of the United States, like the Legislatures of New Jersey and of the many other States mentioned above, consider that benefits in aid of education, extended to students of public and private schools alike, constitute a use of public funds for a public purpose within the framework of the Constitution. If the New Jersey statute here in question is repugnant to the Constitution, then so, too, would be the above Acts of Congress. If the New Jersey statute violates the Constitutional prohibition against the establishment of religion, as claimed, then does not the Servicemen's Readjustment Act do likewise, since the Federal Government makes payments for tuition and other charges directly to denominational institutions? And if the New Jersey statute is unconstitutional because it is a use of public funds for a private purpose, is not the National School Lunch Act invalid for the same reason?

The samples of Federal legislation outlined above indicate the scope of governmental measures which the conscience and judgment of Congress have accepted as being fit subjects of public concern, and for which appropriations are regarded by it as serving a public purpose. There is no reason why the public policy of New Jersey, so far as the Federal Constitution is concerned, should not be regarded as equally reasonable.

With respect to Federal and State legislation alike, appellant's claims have no merit, and the public policy of New Jersey, enunciated by its Legislature, confirmed by its highest court, and concurred in by many other States, should be upheld.

CONCLUSION

It is accordingly respectfully submitted that the judgment below should be affirmed.

October 14, 1946.

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APPENDIX A

Summary of State School Bus Legislation

(Cf. Point IV of Brief *supra*, p. 52)

NOTE:—Wherever a statute has been construed either by a court decision or by an opinion of the state Attorney General, that fact is noted. In the absence of such notation, there appears to have been no construction which would bear upon the issues of the present case.

Alabama—Title 52, Sec. 76, Code of Alabama, 1940.

Provides for "transportation of pupils to and from such consolidated [i.e., public] schools."

Arizona—Sec. 54-510, Ariz. Code Ann., 1939.

School superintendent may allow not in excess of $10 per month per child for transportation of pupils "of compulsory school age, living at such a distance" that school attendance is otherwise impractical.

Arkansas—Sec. 11545, Dig. of Stats. of Ark. 1937.

School districts may provide "means for transporting pupils to and from school."

California—Sec. 16257, Education Code.

Authorizes transportation for "pupils • • • in attendance at a school other than a public school" upon the same terms and over the same route of travel as public-school pupils. Held valid in *Bowker* v. *Baker*, 167 P. (2d) 256 (1946), *supra*, page 50.

Colorado—Sec. 114, Ch. 146, 1935 Colo. Ann. Stat.

School boards may "furnish transportation to and from any school building to such pupils as shall in the opinion of the board of education * * * require such transportation."

State Attorney General has ruled that the private-school pupils may be transported on regular public-school bus routes if "no money from taxation is involved." (*Biennial Report of the Attorney General of the State of Colorado*, 1939-1940, page 157 (opinion dated Sept. 17, 1940).)

Connecticut—Sec. 237h, 1945 Supp. to Gen. Stats. of Conn.

Local authorities may "provide for the transportation of children wherever transportation is reasonable and desirable."

Delaware—Sec. 2635, Rev. Code of Del., 1935.

Provides for transportation only in the case of consolidation of public schools.

Prior statute specifically appropriating funds for transportation of children attending church schools held unconstitutional by Superior Court in *State ex rel. Traub* v. *Brown*, 36 Del. 181, 172 Atl. 835 (1934), writ of error dismissed by Supreme Court on the ground that the case had become moot, 39 Del. 187, 197 Atl. 478 (1938).

District of Columbia—Title 44, Sec. 44-214, D. C., Code, 1940.

Statute requires reduced fares, not exceeding 3¢, on all street railway and bus lines for "school children not over eighteen years of age, going to and from school". The Bill as it originally passed the House of Representatives (H. R. 12571, 71st Cong., 2nd Sess.) provided reduced fares for

public-school children only, but was amended in conference to include all school children (*supra*, p. 57).

Florida—Secs. 230.23 (10), 234.01, Florida Stats., 1941.

Provides for "transportation of pupils to the public schools."

Georgia—Sec. 32-919, Code of Georgia Annotated.

"Whenever the county board of education or local district trustees deem it for the best interest of the school, they shall have the right to provide means for the transportation of the pupils and teachers to and from said school."

Idaho—Sec. 32-618, 1940 Supp. to Idaho Code Ann. 1932.

School board may provide transportation for "resident pupils living more than one and one-half miles from the school of the district at which they are attending."

State Attorney General has ruled that this applies to public-school pupils only. (*Biennial Report of Attorney General of Idaho* 1941-1942, p. 512).

Illinois—Sec. 123.1278, Jones Illinois Stat. Ann.

Requires free transportation for "children who attend any school other than a public school" who "reside on or along the highway constituting the regular route of any public school bus or conveyance."

Indiana—28-2805, Burns Ind. Stat. Ann.

Requires free transportation of "school children who are attending any parochial school" and who "reside on or along the highway constituting the regular route of a public school bus or conveyance."

State Attorney General has ruled that local authorities are bound to transport as many parochial-school pupils as can be accommodated in the regular school bus. (*Opinions of the Attorney General of Indiana, 1936,* page 415.)

Iowa—Sec. 276.26, Code of Iowa, 1946.

"The board of every consolidated school corporation shall provide suitable transportation to and from school for every child of school age living within said corporation and more than a mile from such school".

In 1936 the State Attorney General ruled that it was constitutional to transport private-school pupils free on regular public-school bus routes. (*Report of Attorney General of Iowa, 1936,* p. 512.)

The present Attorney General ruled on February 11, 1946 (opinion unreported) that a statute which reimbursed school districts for bus expenses and which referred to "public schools" implied that transportation of public-school pupils alone was authorized. Litigation on this question is now pending in lower courts.

Kansas—72-606, 1945 Supp. to Gen. Statutes 1935.

Requires free transportation on regular public school bus routes for "pupils attending private or parochial schools of elementary and high school grades which are approved by the state board of education."

Kentucky—158.110, Revised Statutes Ann.

Authorizes boards of education to furnish transportation to any school pupils "who do not reside within reasonable walking distance of the school provided for them."

Constitutionality with respect to transportation of private school pupils sustained in *Nichols* v. *Henry*, 301 Ky. 434, 191 S. W. (2d) 930 (1945). *Cf.* earlier decision on the previous statute in *Sherrard* v. *Jefferson County Board of Education*, 294 Ky. 469, 171 S. W. (2d) 963 (1942), discussed *supra*, page 46.

Louisiana—Sec. 2248, 1946 Supp. to Gen. Stats. 1939.

Authorizes local boards to provide transportation for "children attending any school approved by the state board of education and living more than one mile from such a school of suitable grade".

Sec. 2367, General Statutes of 1939, requires that in all street railway franchises thereafter granted outside the Parish of Orleans, all school children should be given reduced rates not exceeding three-fifths of the regular fare.

State Attorney General has ruled that provision with respect to transportation of private and parochial-school pupils is constitutional (*Report and Opinions of the Attorney General of Louisiana from April 1, 1934 to April 1, 1936*, p. 241).

Louisiana statutes (Acts No. 100 and 143 of 1928) also provide for free school books for all children. Constitutionality of school book statute as applied to private school pupils sustained under State Constitution in *Borden* v. *Louisiana State Board of Education*, 168 La. 1005 (1929), and under Federal Constitution in *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370 (1930).

Maine—Sec. 8, Ch. 37 Rev. Stat., 1944.

Requires local authorities to transport "all elementary school pupils" residing in the town "a part of or the whole of the distance to and from the nearest suitable school".

State Attorney General has ruled that public funds cannot be used to transport pupils to private schools (opinion unreported).

Maryland

The Maryland Legislature has dealt with this problem by a series of local laws applicable to particular counties.

Ch. 185 of the Laws of 1937 required free transportation on regular public-school buses for "all children who attend schools in Baltimore County, which schools do not receive State aid." The constitutionality of this statute with respect to transportation of parochial-school pupils was sustained in *Board of Education* v. *Wheat*, 174 Md. 314, 199 Atl. 628 (1938).

Ch. 609 of Maryland Statutes of 1941 authorizes County Commissioners of St. Mary's County to levy and appropriate annually sufficient funds "for the transportation to and from school of children attending schools" in St. Mary's County not receiving aid from the State. Under this statute the County Commissioners made direct financial grants to parochial schools to enable them to operate their own buses. Constitutionality of statute and action of County Commissioners sustained in *Adams* v. *County Commissioners*, 180 Md. 550, 26 A. (2d) 377 (1942).

Additional statutes on the same subject are as follows:

Maryland Code, Public Local Laws, Article 16, §§997, 998, enacted by Ch. 977, Laws of 1945—applicable to "denominational or parochial non-profit schools" in Montgomery County.

Maryland Code, Public Local Laws, Article 11, §718(a) and §718(b), enacted by Ch. 422, Laws of 1941—applicable to "parochial schools" in Frederick County.

Maryland Code, Public Local Laws, Article 14, §291(a), §291(b), enacted by Ch. 648, Laws of 1943—applicable to parochial schools in Howard County "which schools do not receive state aid."

Massachusetts—Ch. 390, Acts, 1936.

Pupils attending private schools "except such schools as are operated for profit in whole or in part" are entitled to the same transportation privileges as public-school pupils.

State Attorney General has ruled that legislation is constitutional (*Report of Attorney General of Massachusetts for year ending Nov. 30, 1936*, p. 40).

Michigan—§§15.381, 15.392 and 15.457, Mich. Stat.

Authorize local authorities to furnish free transportation to private and parochial-school pupils along regular public school bus routes.

State Attorney General has ruled legislation constitutional. (Opinion dated Mar. 14, 1939, not reported.)

Minnesota—Sec. 125.06, Minn. Stats. 1945.

School boards may provide for free transportation "of pupils to and from school".

State Attorney General has ruled that owner of a school bus may transport parochial-school pupils if the district expends no funds therefor. (Opinion dated Dec. 10, 1937, not reported.) This presumably means that parochial-school pupils may travel free if the bus is not already full with public-school pupils.)

In a later opinion, the State Attorney General ruled that public school buses may not be used in transporting pupils attending parochial schools, but parochial schools may operate transportation systems and the public school

system could hire the transportation of the public school pupils therein. (Opin. Atty. Gen. (166a-7) Sept. 10, 1943.)

Mississippi—Sec. 6335, Miss. Code Ann., 1942.

Authorizes transportation of "pupils living a distance of two miles or more by the nearest traveled road from the school to which they are assigned".

Statute not officially construed; but Mississippi free textbook statute applicable to private-school pupils was sustained in *Chance* v. *Mississippi State Textbook Rating and Purchasing Board*, 190 Miss. 453, 200 So. 706 (1941).

Missouri—Sec. 10326, Mo. Rev. Stat.

Authorizes transportation of pupils attending private schools "except such schools as are operated for profit".

State Attorney General has ruled statute constitutional (Opinion dated March 21, 1946, not yet published).

Montana—Ch. 152, Sec. 8, Laws, 1941.

Any child attending "other than a public school" may receive a permit to ride on a public-school bus, provided his parents "pay their proportionate share of the cost of such transportation."

Statute not yet officially construed, but presumably payment of regular public-school taxes would amount to payment of a proportionate share of the cost of the public-school bus.

Nebraska—Secs. 79-2416 and 79-1907, Revised Stats. of Nebraska.

Authorize transportation, or cash allowance in lieu thereof, to pupils living more than a certain distance from

the public school. Apparently authorize transportation of public-school pupils only.

Nevada—Sec. 5951, Nev. Comp. Laws, 1929.

Authorizes transportation "to and from school" for all children living one mile or more therefrom.

New Hampshire—Ch. 135, Sec. 9 of Rev. Laws, 1942.

"Pupils attending approved private schools, up to and including the ninth grade" are entitled to the same transportation privileges as public-school pupils.

State Attorney General has ruled that this provision is constitutional (*Attorney General's Report, 1936-1938,* p. 33.)

New Jersey—Ch. 191, P. L., 1941.

Authorizes local authorities to provide for transportation of children to and from any school "except such school as is operated for profit in whole or in part". Where transportation is provided for public-school children, private-school children must receive transportation "from any point in such established school route to any other point in such established school route."

Constitutionality of statute upheld in *Everson* v. *Board of Education,* 133 N. J. L. 350, 44 A. (2d) 333 (1945).

New Mexico—55-1802, N. Mex. Stat. Ann., 1941.

Refers to "transportation of pupils in the public schools."

New York—Art. XI, Sec. 4, Constitution.

"The legislature may provide for the transportation of children to and from any school • • • ".

The foregoing provision was added to State Constitution in November 1938 to overcome effect of *Judd* v. *Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576 (May, 1938), holding earlier legislation unconstitutional. Under present constitutional authority, Legislature now provides equal transportation facilities to all schools, public and private (*N. Y. Education Law*, Secs. 206(18) and 503).

North Carolina—§§115-374, Gen. Stat., N. Car., 1943.

Refers to "transportation of public school children."

North Dakota—Sec. 15-3405, N. D. Rev. Code, 1943.

Provides that transportation may be furnished "each family living more than two miles from a school in the district which is taught the required length of time".

State Attorney General has ruled that private-school pupils may not be transported. (*Report of the Attorney General of North Dakota, July 1, 1942 to June 30, 1944*, p. 96.)

Ohio—Sec. 4855, Page's Ohio Gen. Code Ann.

Requires transportation to be furnished "where resident elementary school pupils live more than two miles from the school to which they are assigned".

State Attorney General has ruled that boards of education are without authority to furnish transportation for pupils attending other than the public schools. (*1927 Atty. Gen. Opns.* p. 1935.)

Oklahoma—Sec. 254, Title 70, Okla. Stat. Ann.

Requires that transportation be provided "to and from school for all pupils residing two or more miles therefrom".

Prior statute giving transportation privileges to pupils attending private or parochial schools located "along or near" public-school bus routes was held unconstitutional under State Constitution in *Gurney* v. *Ferguson*, 190 Okla. 254, 122 P. (2d) 1002 (1941), cert. den. 317 U. S. 588, rehearing denied 317 U. S. 707 (1942).

Oregon—Sec. 111-874, Comp. Laws Ann.

Wherever transportation is provided for public-school pupils, private and parochial-school pupils attending school "along or near" the public-school bus route are entitled to the same transportation.

Oregon also provides free textbooks to both public and private-school pupils (Sec. 111-2015, Oregon Comp. Laws Ann., 1943 Supplement).

The provision of both free textbooks and free transportation to private-school pupils represents a complete reversal of legislative policy in Oregon, when compared with the earlier legislation of 1922, which attempted to outlaw private schools altogether and was held unconstitutional in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925).

Pennsylvania—Sec. 24-1425, Purden Pa. Stat. Ann.

Exempts children from compulsory school attendance laws "in case there is no public school in session within two miles by the nearest public highway" from their residence, "unless proper free transportation be furnished to such child to and from school."

Rhode Island—Section 31, Ch. 178, Gen. Laws 1938:

"The school committee of any town shall provide for pupils attending private schools of elementary and high school grades, except such schools as are oper-

ated for profit, the same rights and privileges as to transportation to and from schools as are provided for pupils attending public schools."

South Carolina—Secs. 5385(1), 5385(2), Code Laws, So. Car. 1942.

Sec. 5385(1) refers to official routes "for the transportation of pupils to and from public schools."

Sec. 5385(2) provides for payment out of public funds for transportation of pupils on such routes.

South Dakota—Sec. 15:3401, 15:3404, So. Dakota Code of 1939.

Refers to grade-school pupils who reside more than four miles from "the nearest school in the district" and to pupils in consolidated school districts who reside more than 2-1/2 miles "from the school".

It appears to be a reasonable inference from *Schiltz* v. *Picton*, 66 S. Dak. 301, 282 N. W. 519 (1938) that the statute applies to public-school pupils only, although that case (a negligence action involving an injury to a parochial-school pupil riding on a public-school bus) was based primarily on the language of the contract between the school board and the bus operator, and the court did not discuss any broader grounds of constitutional law or statutory interpretation.

Tennessee—2326, Williams Tenn. Code, 1934.

Authorizes local authorities to provide transportation for "pupils who reside too far away from the school to attend without such transportation".

Texas—Art. 2813, Vernons Tex. Civ. Stat. Ann.

Authorizes local authorities to provide "for the transporting of pupils to and from any elementary school or high school of the district".

Case now pending in lower courts involving the right of parochial-school children to ride on public-school buses.

Utah—75-7-24, Utah Code Ann., 1943.

Minimum uniform education program in each district shall include "the transportation to and from school of all pupils living more than two and one-half miles from school".

Vermont—Sec. 4269, Title 18, Pub. Laws Vt, 1933.

Authorizes transportation for each pupil "who resides at least two miles from the school he is required to attend".

Virginia—Sec. 656, Va. Code Laws, 1942.

Gives school boards authority to provide "for the consolidation of schools and for the transportation of pupils whenever such procedure will contribute to the efficiency of the school system".

Washington—Sec. 4719-1, Remington's Revised Statutes, Supplement (1945).

"All children attending school in accordance with the laws relating to compulsory attendance in the State of Washington shall be entitled to use the transportation facilities provided by the school district in which they reside."

This statute was enacted by the Washington Legislature in 1945 for the purpose of providing free transportation of private-school pupils, notwithstanding the 5 to 4 deci-

sion of the Supreme Court of Washington in *Mitchell* v. *Consolidated School District*, 17 Wash. (2d) 61, 135 P. (2d) 79 (March 1943), holding unconstitutional a prior statute giving private school pupils transportation in the regular public-school buses. The constitutionality of the present legislation is involved in a case now pending in the lower courts *Visser* v. *Nooksack School Dist.* (Superior Court for Whatcom County).

West Virginia—Sec. 13, Ch. 49, Laws, 1945.

Local authorities may provide transportation at public expense "for all children of school age who live more than two miles distant from school".

Wisconsin—Sec. 40.34, Wisc. Stat., 1945.

Local authorities may provide transportation "for all the children of school age residing in the district and enrolled in the elementary grades".

In *State ex rel Van Straten* v. *Milquet*, 180 Wisc. 109 (1923), 192 N. W. 392, the Supreme Court of Wisconsin decided that an earlier statute which required a school district, upon the suspension of its local school, "to provide transportation to and from school" in some other district did not authorize a contract for the transportation of parochial-school pupils.

In *Rutz* v. *Marek* (unreported, decided 1941), the Circuit Court of Chippewa County passed upon an earlier version of Section 40.34(2), which authorized transportation for children residing more than two miles "from the nearest school which they may attend". It held that that statute authorized transportation of private-school pupils, and as so interpreted was constitutional.

In *Costigan* v. *Hall*, 23 N. W. (2d) 495 (June 22, 1946, not yet officially reported), the Supreme Court of the State interpreted Section 40.34(2) in its present form (which speaks of "the nearest district school or federal school") as authorizing transportation of public-school pupils only. The constitutional issue was not decided (*cf.* brief *supra*, p. 41).

Constitutional amendment to authorize transportation of private-school pupils now pending (*cf.* brief *supra*, pp. 41-42).

Wyoming—Ch. 10, Session Laws, 1943.

Local authorities may provide transportation "for elementary or high school pupils within the district".

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 52.

ARCH R. EVERSON, *Appellant*,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL., *Appellees*.

Appeal from the Court of Errors and Appeals of the State of New Jersey.

BRIEF OF THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AND THE JOINT CONFERENCE COMMITTEE ON PUBLIC RELATIONS REPRESENTING THE SOUTHERN BAPTIST CONVENTION, THE NORTHERN BAPTIST CONVENTION, THE NATIONAL BAPTIST CONVENTION, INC. AMICI CURIAE.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
PRELIMINARY STATEMENT	2
THE STATUTE	2
THE FACTS	3
THE ISSUE	4
THE ARGUMENT	4

TABLE OF CASES CITED.

Adams v. County Commissioners, 26 Atl. 2d 337 ..... 8, 13
Bennett v. La Grange, 153 Ga. 428, 22 L. R. A. 1312 6
Board of Education v. Wheat, 199 Atl. 628 ..... 8, 13
Board of Education v. Barnette, 319 U. S. 624 ..... 5, 16
Borden v. Louisiana Board, 168 La. 1030 8
Bowker v. Baker, 167 Pac. 2d 260 ..... 13, 14
Cantwell v. State, 310 U. S. 296 5
Chance v. Mississippi Board, 200 So. 706 ..... 8, 10
Cochran v. Louisiana Board, 168 La. 1030 ..... 8, 11
Cole v. LaGrange, 113 U. S. 1 6
Curtis v. Whipple, 25 Wisc. 350 6
Douglas v. Jeannette, 319 U. S. 156 5
Fall Brook Irrigation Dist. v. Bradley, 164 U. S. 112 .. 6
Home Building Association v. Blaisdell, 290 U. S. 434 .. 15
Green v. Frazier, 253 U. S. 233 6
Gurney v. Ferguson, 122 Pac. 2d 1002 ..... 8, 9, 12, 18
Jacobson v. Mass., 197 U. S. 25 15
Jenkins v. Anderson, 103 Mass. 94 6
Judd v. Board of Education, 278 N. Y. 200 ..... 8, 9
Knowlton v. Baumhover, 182 Iowa 691 18
Lochner v. New York, 198 U. S. 45 15
Loan Association v. Topeka, 20 Wall 655 6
Lowell v. Baston, 111 Mass. 454 7

Page

Marsh v. Alabama, U. S. Supreme Court, Jan. 7, 1946 . . . 15, 17
Mitchell v. Con. School Dist., 135 Pac. 2d 79 . . . . 8, 9, 12, 15
Murdoch v. Pennsylvania, 319 U. S. 105 5
Nichols v. Henry, 191 S. W. 930 . . . . . 13, 14
Parkersburg v. Brown, 106 U. S. 487 6
Schneider v. Irvington, 308 U. S. 147 . . . . . 5, 13
Sherrard v. Jefferson County Board, 294 Ky. 469 . . 8, 12, 14
Smith v. Donahue, 195 N. Y. 5, 715 10
State ex rel Traub v. Brown, 172 Atl. 835 . . . . . 8, 9, 12
Thompson v. Con. Gas Utilities Co., 300 U. S. 55 6
Von Straton v. Milquet, 180 Misc. 109 8
Williams v. Board of Trustees, 173 Ky. 708 8

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This brief Amici Curiae is filed with the consent of counsel for appellant and for appellees.

The organization of the Seventh Day Adventists maintains in this country and Canada 2713 Church organizations and 2518 ministers and Bible instructors; together with elementary schools, academies and colleges, including a medical college, with a student capacity above elementary grades of 16,945. Other Christian activities include the maintenance of fifteen sanitariums and hospitals scattered over the United States. These activities are supported by its membership.

The Joint Conference Committee represents the four Conventions with a membership of approximately 14,000,000

and 65,000 churches. One hundred and thirty (130) schools and colleges are maintained with a student body of 52,000 apart from many other activities including orphan asylums and hospitals. These activities are voluntarily supported by the membership.

IMPORTANCE OF THE QUESTION.

It may be said that the interest of the organizations is specific, but also the issue is of vital concern to all religious groups calling for a pronouncement by this Court as to whether the factual situation presented constitutes an invasion of the time-honored doctrine of the separation of Church and State safeguarded by the Constitution. The question is thus squarely presented here for the first time, whether a state may, consistently with the bill of rights of the Constitution, give aid or support to religious organizations conducting schools, teaching religion, as well as other subjects, by payment, out of funds raised by taxation, to the parents of children who elect to send their children to religious schools, for transportation to such schools (in this instance to parochial schools of the Catholic Church) under the sole control of church authorities and without any control whatever by the public school authorities.

This is an appeal from a decision of the New Jersey Court of Errors and Appeals upholding the constitutionality of a resolution of the Appellee Board of Education and an act of the Legislature of the State of New Jersey, which resolution and Statute had been duly attacked in the pleadings as being an infringement of the Fourteenth Amendment of the Constitution of the United States and Appellant's rights thereunder. The pertinent portion of the statute in question (Chapter 191, Laws of 1941 of the State of New Jersey) is as follows:

> "18:14-8. Whenever in any district there are children living remote from any schoolhouse, the board of Education of the district may make rules and contracts for the transportation of such children to and from

school, *including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.*

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part."

The resolution, based on said statute, is as follows:

"The Transportation Commtt. recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic Schools, by way of public carriers as in recent years. On Motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted."

THE FACTS.

Pursuant to said resolution, the appellee Board of Education authorized the payment of the cost of transportation of certain pupils from the Township of Ewing to certain Catholic parochial schools in Trenton in the amount of $8034.95, of which amount $357.74 was paid to the parents of twenty-one pupils so transported, five to elementary schools and sixteen to high schools. This payment was made from public moneys direct to parents, resident in the Township of Ewing, by way of reimbursement for the bus fares paid by their said children on public busses between the Township and the City of Trenton where the children attended said parochial schools. The religion of the church was taught in each of said schools as part of the curriculum. A priest of the church was the Superintendent of the Schools. The resolution in question made no provision for the transportation to private and sectarian schools other than Catholic Schools. The busses ran on

their usual schedules and added nothing to protection against traffic hazards. The Township public schools extend through the eighth grade. Public school children beyond these elementary grades are transported to Trenton or Pennington High Schools. Five of the parochial school children transported to Trenton were in the elementary grades, notwithstanding the fact that elementary free public schools were maintained and available to them in Ewing Township.

THE ISSUE.

The single issue presented here is whether, under the resolution and statute in question, the State of New Jersey, having a free public school system, supported by the State, to which all taxpayers have equal benefit, and to which all children have access in terms of equality, may, without violating the prohibitions of the Fourteenth and First Amendments of the Constitution of the United States, divert any of the tax funds to the support or aid, directly or indirectly, of private, parochial schools, by payments direct, or to patrons of admittedly private enterprises, where the entire control, curriculum, and tenets of faith and instruction of said parochial schools rest completely in the private hands of a sectarian, religious organization. In other words, may the state use said public funds to reimburse parents for bus fares paid by their children in attending private, religious schools where the State provides free public schools for the use of all of its children and free transportation thereto.

THE ARGUMENT.

It is submitted that the resolution and statute here in question violate the Fourteenth Amendment (a state may not deprive any person of property without due process of law), and by importation the First Amendment (Congress shall make no law respecting the establishment of religion), of the Constitution of the United States, for the following reasons:

1. This Court has repeatedly held that the Fourteenth Amendment has made applicable to the states the guaranties of the First Amendment. While the Fourteenth Amendment deals only with the deprivation "of life, liberty or property without due process of law", the principles of the First Amendment—including the prohibition against any law respecting the establishment of religion—furnish a chart or yard-stick by which due process of law may be measured. A violation of the First Amendment to the Constitution is also a violation of the Fourteenth Amendment.

Douglas v. *Jeanette*, 319 U. S. 156.
Schneider v. *Irvington*, 308 U. S. 147.
Murdoch v. *Pennsylvania*, 319 U. S. 105.
Cantwell v. *State*, 310 U. S. 296.

In a later case, *Board of Education* v. *Barnette*, 319 U. S. 624, Mr. Justice Jackson amplifies these principles of construction in the following language:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assemply, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.
>
> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the

due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

2. It has long been established by the adjudicated cases that taxes levied by a State must be for a public purpose. It is our contention that aid, direct or indirect, to private or sectarian schools is for a private as distinguished from a public purpose, and that public school funds may not be used to give financial support or aid to the private, parochial schools in question, not a part of the public school system of New Jersey, nor under its control. The leading case on the subject is *Loan Association* v. *Topeka*, 20 Wall. 655. A long line of decisions support this view: *Jenkins* v. *Anderson*, 103 Mass, 94; *Curtis* v. *Whipple*, 25 Wisc. 350; *Parkersburg* v. *Brown*, 106 U. S. 487; *Cole* v. *LaGrange*, 113 U. S. 1; *Fall Brook Irrigation District* v. *Bradley*, 164 U. S. 112; *Green* v. *Frazier*, 253 U. S. 233; *Thompson* v. *Consolidated Gas Utilities Co.*, 300 U. S. 55, 80; *Benneft* v. *La Grange*, 153 Ga. 428, 22 L. R. A. 1312. These fundamental principles are so firmly established that it is not deemed necessary to extend this brief by elaborate quotations.

In the case at bar, the parents declined to use the free public school facilities provided by the State. They elected to send their children to private religious schools, not under the control of the State. They were paid direct by the State the cost of transporting their children to private parochial schools. This situation constituted a diversion of the school funds between a *public use* and a *private use* and is contrary to the fundamental principles of the Fed-

eral Constitution. The promotion of the interests of individuals, either in respect of their property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private, and not a public, object. *Lowell* v. *Baston*, 111 Mass, 454. Among the uses which clearly fall on the private use side are those in which the public has neither control, as such, nor common and general access to or benefit from. In a word, the exercise of religious liberty, or the choice in the exercise of religious liberty, or the election to send children to religious schools may not be *subsidized* by the State, directly or indirectly. To do so would be to divert public property to private individuals without distinction as to need for charity and without any obligation of the State to such persons, the State having fully provided free schools open to all children. Again, the resolution in this case which authorizes transportation of children to Catholic schools, and makes no provision for transportation of children attending sectarian schools other than Catholic school, segregates the schools and the pupils designated as beneficiaries, and constitutes a taking of private property for a private use.

3. The resolution in question, as well as statute on which it is based, authorizing the use of tax moneys for the purpose of furnishing transportation of children attending sectarian schools is legislation respecting the establishment of religion and gives effective aid to such organizations in the teaching of their religious tenets and the extension of their religious ministrations. In so doing, such legislation contravenes the mandate of the separation of church and state inherent in the First Amendment, providing that there shall be no law respecting an establishment of religion, and the mandate of the Fourteenth Amendment that public funds shall be devoted wholly to a public use and not to a private use.

A major question has been raised in the state courts as to whether the furnishing of transportation to private

and parochial schools out of public money is in aid or support of such schools and whether constitutional provisions which prohibit such aid or support are violated by statutory authority for transportation. The argument that such disbursements are not in aid of the schools is based upon the so-called "child-benefit" theory, that is, that the transportation charges are for the benefit of the children rather than the schools.

The "child benefit" theory has received judicial support in two States (where the subject matter was the free distribution of certain textbooks to the children of the State generally. (*Bordon* v. *Louisiana State Board of Education,* 168 La. 1005; *Cochran* v. *Louisiana Board,* 168 La. 1030; *Chance* v. *Mississippi Board,* 200 Southern 706) and in one State, Maryland, (*Board of Education* v. *Wheat,* 199 Atl. 628 and *Adams* v. *County Commissioners,* 26 Atl. 2nd 377) where it was held that contributions from public money for transportation of children to parochial schools, either public school busses or parochial school busses, was constitutional.

The courts of six states have held that private and parochial schools attended by the children are beneficiaries of such legislation and that the legislation violates constitutional provisions which prohibit such benefactions.

> State ex rel, Traub v. Brown (1934, 6 W. W. Harr. 32, 36 Del. 181, 172 Atl. 835 (writ of error dismissed 39 Del. 187, 197 Atl. 478); Gurney v. Ferguson (1941), 190 Okla, 254, 122 Pac. 2d 1002; Judd v. Board of Education (1938), 278 N. Y. 200, 15 N. E. 2d 576; Mitchell v. Consolidated School District (Wash. 1943), 135 Pac. 2d 79; Williams v. Board of Trustees (1917), 173 Ky. 708, 191 S. W. 507, L. R. A. 1917D 453; Sherrard v. Jefferson County Board of Education (1943), 294 Ky. 469, 171 S. W. 2d 963; Von Straten v. Milquet (1923), 180 Wisc. 109, 192 N. W. 392.)

The following excerpts from four of these cases will disclose how strongly the courts have expressed themselves on this issue:

From *Mitchell* v. *Consolidated School District* (State of Washington Supreme Court):

"We think the conclusion is inescapable that free transportation of pupils serves to aid and build up the school itself. That pupils and parents may also derive benefit from it, is beside the question."

From *Gurney* v. *Ferguson* (Oklahoma Supreme Court):

"It is argued that the present legislative act (providing for transportation of pupils attending public schools) does not result in the use of public funds for the benefit or support of this sectarian institution or schools 'as such'; that such benefit as flows from these acts accrues to the benefit of the individual child or to a group of children as distinguished from the school as an organization. That argument is not impressive. * * * It is true this use of public money and property aids the child, but it is no less true that practically every proper expenditure for school purposes aids the child."

From State ex rel. *Traub* v. *Brown* (Delaware Superior Court):

"We are of the opinion that to furnish free transportation to pupils attending sectarian schools, is to aid the schools. It helps build up, strengthen and make successful the schools as organizations. The relators cite in opposition to the above cases, the case of Borden v. Louisiana State Board of Education, 168 La. 1005, 123 So. 655, 67 A. L. R. 1183. We are not impressed by the reasoning of this case."

From *Judd* v. *Board* (New York Court of Appeals):

"The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils. That argument is utterly without substance, * * * Free transportation of pupils induces attendance at the school. The purpose of the transpor-

> tation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. * * * It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid. * * * The courts of this country have been unanimous in prohibiting a use of public funds to pay, directly or indirectly, tuition fees of pupils in private or sectarian schools (citing cases) in spite of the argument presented that tuition fees were for the benefit of pupils exclusively and not for the schools."

In *Chance v. Mississippi State Textbook Board, supra,* the Court, in referring to *Smith* v. *Donahue,* 195 N. Y. S. 715, which held that the furnishing of textbooks and supplies to parochial school children was unconstitutional, said:

> "It can be seen that if it were necessary to differentiate the case as authority here, the furnishing of supplies in addition to books, as contrasted with the loaning of books with the right to compensation for damage or loss thereto, as in our statute, would furnish the necessary clue,"

thus indicating that the result in the *Chance case* would have been different, if supplies as well as textbooks had been furnished in that case.

Mr. Justice Case, in his dissenting opinion in the Court below, Record page 51, had this to say about the "child-benefit" theory:

> "Among its weaknesses, as a means of avoiding constitutional inhibitions, are its vagueness and the impossibility of satisfactorily distinguishing one item of expense from another in the long process of child education. * * * I am unable to distinguish between the logic of using public funds for one as against another of the several parts of the system pursued by the public schools toward 'the advancement of education, the promotion of literacy and the health of safety' of the

pupils. Every step in the educational process is presumably, for the benefit of the child and, therefore, theoretically, for the benefit of the State. Consequently, if the argument is sound, it is within the discretion of the legislature, free of constitutional restraint, to provide for practically the entire cost of education in private and parochial as well as in public schools."

The overwhelming weight of authority is that the "child-benefit" theory is an ingenious effort to escape constitutional limitations rather than a sound construction of their essential content and purpose. The editor of A. L. R. by way of resumé of the law in the cases reported and annotated in 63 A. L. R. 413, 118 A. L. R. 806 and 141 A. L. R. 1152 reaches this well supported conclusion:

> "It seems to have been held, in most cases that the transportation of pupils to a sectarian school amounts to the appropriation of moneys in aid of the school and is therefore unconstitutional."

4. The case of *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370, 74 Law Ed 913, is not even persuasive in support of the issue in the case at bar. The facts are clearly different. In the *Cochran case*, the public school books were furnished to all of the children of the state. They were not books adapted to the religious schools, but were books in common use in the public schools. They were under the control of the State and were thereby loaned to the children and not given to them. The statute there under review contemplated that the same books that are furnished children attending public schools shall be furnished children attending private schools. After reviewing these limitations, inherent, in, and ascribed to, the statute by the Supreme Court of Louisiana, Chief Justice Hughes said:

> "Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the State is exerted for a public purpose."

There is a striking analogy here to the status of public libraries. Certainly, there can be no serious doubt of the power of the state under the Fourteenth Amendment to purchase public school books and deposit them in agencies under its control, available to all of the children of the state, regardless of their religious creeds, and loan them to those desiring them.

But the case at bar presents an entirely different situation—where the state furnishes financial aid to parents of the children attending religious schools, over which the state has no control and which are not a part of the free public school system open to all the children of the state on equal terms. In further support of the contention that the *Cochran case* has no application to the case at bar, several decisions of the highest courts of the states (rendered since the decision in the *Cochran case*) have held invalid the furnishing of free transportation to private or parochial schools. *Gurney* v. *Ferguson*, 190 Okla. 54 (1941); *State ex rel Traub* v. *Brown*, 36 Del. 181; *Mitchell* v. *Consolidated School District*, 135 Pac. 2d 79 (1943); *Sherrard* v. *Jefferson County Board of Education*, 294 Ky. 469 (1943).

5. The opinion of the Chancellor in the court below places great emphasis on the fact that New Jersey has a compulsory education law, and makes the contention that the statute here in question is complementary to, and in aid of, the compulsory education statutes. The contention is neither compelling nor persuasive. The fact that the state has a compulsory education law is no justification for violation of specific constitutional limitations, which limitations, so far as they apply to the states, are restrictions on the states as to specific acts. The separation of church and state and the restrictions on the use of public funds are fundamental and vital principles. They are not to be encroached upon to further the convenience of the state in enforcing its legitimate mandates. For example, a city may pass ordinances against littering the streets, but

it may not forbid the distribution of religious books because such distribution may have the tendency to interfere with the enforcement of such ordinances. *Schneider* v. *Irvington*, 308 U. S. 147, 161.

New Jersey furnished all of the children of the State free public schools and free transportation thereto—adequate facilities to permit all parents to comply fully with the compulsory school law. But the parents, in the case at bar, declined to use these facilities and elected to send their children to religious schools. The fact that the state has a compulsory school law is not a valid reason for *subsidizing* the parents in the exercise of their choice, particularly where that choice is on religious grounds and the payment is solely because of their religious beliefs. To do so would be to use public funds for a private purpose. Certainly, there can be no public benefit from public money spent to procure what has already been adequately provided at public expense.

6. Judicial approval has been given to the payment from public funds of the costs of transportation of children to private or parochial schools, under varying circumstances, in three States: *Maryland* (*Board of Education of Baltimore County* v. *Wheat*—May 20, 1938—199 Atl. 628, and *Adams* v. *County Commissioners of St. Mary's County*—May 26, 1942—26 Atl. 2d 377), *Kentucky* (*Nichols* v. *Henry*—November 27, 1945. Rehearing denied Feb. 8, 1946—191 S. W. 2d 930), *California* (*Bowker* v. *Baker*—March 26, 1946—167 Pac. 2d 260).

In the first Maryland case, supra, transportation was provided on regular school busses, the court emphasizing that it was the duty of the state that all school children have protection against traffic hazards and that the law in question was in furtherance of compulsory education statutes.

In the second Maryland case, supra, four years later, transportation was provided out of public funds on busses owned by the parochial schools, showing a trend from one

to the other of these cases toward enlargement of participation of the State in transporting children to parochial schools.

In *Nichols* v. *Henry, supra,* the Kentucky Court, although adhering to its decision in *Sherrard* v. *Jefferson County Board of Education, supra,* holding that public school funds cannot be used for transportation to sectarian schools, decided that, under the facts in the *Nichols case,* where there were no sidewalks along the highway the pupil is compelled to travel, the act legally authorized the use of County funds for transportation of pupils to private schools, although such transportation could not be paid out of the general funds. In addition, the decision was grounded on protection against traffic hazards and that the act was in aid of compulsory education laws.

In the case of *Bowker* v. *Baker, supra,* the action in permitting pupils of parochial schools to ride on public school busses when there were vacant seats, appears to have been based in part on the war emergency and defense program, and the further fact that the parochial schools could not obtain busses as a result of war shortages. When the seats in the public school busses were filled, no private school pupils were permitted to ride. The statute prohibited payments to parents of children in lieu of transportation. The decision emphasized the traffic hazard argument in favor of validity of the statute. In this connection, it should be emphasized that the question of traffic hazards is not involved in the case at bar, as the children traveled on public busses on their reguar schedules.

The decisions in these four cases, involving the payment of transportation of children to parochial schools, were grounded squarely on the theory that it is an exercise of the police power of the state. It is recognized as elementary that the state possesses certain power inherent in sovereignty itself—police power—to guard against, or prevent, disease, fires, immorality, etc., but such police power ends where the supreme law of the land begins. The police

power of the State must give way when it collides with specific constitutional limitations, such as the mandates of the Fourteenth and First Amendments.

Home Building Association v. *Blaisdell*, 290 U. S. 434, 78 L. Ed. 426; *Jacobson* v. *Mass.*, 197 U. S. 25; *Lochner* v. *New York*, 198 U. S. 45; *Mitchell* v. *Consolidated School Dist.*, 135 Pac. 2d 79.

Mr. Justice Frankfurter, in his concurring opinion in *Marsh* v. *Alabama*, decided January 7, 1946, a case involving freedom of religion, in referring to a State Court decision in connection with the "dedication" of certain property, said:

> "Constitutional privileges (freedom of speech and religion) having such a reach ought not to depend upon a State Court's notion of the extent of "dedication' of private property to public purposes. Local determinations of such technical matters govern controversies affecting property. But when decisions by State Courts involving local matters are so interwoven with the decision of the question of constitutional rights that one necessarily involves the other, State determination of local questions cannot control the Federal constitutional right."

7. The claim of "equal treatment" of children attending parochial schools and those attending public schools is a fallacious argument in the discussion of the relations of the state to private religious schools. The children attending parochial schools are not to be *restricted* so as to achieve "equal treatment" in the matter of public control and supervision; likewise, they are not to be *aided* in order to bring about equality with public school children; for both the *restriction* and the *aid* run counter to the absolute "separation of church and state." In matters which concern the parochial school children in connection only with their religious beliefs, the policy of the state must be "hands off," in *aid* as well as *restriction*. This is ex-

pressed by Mr. Justice Jackson in his opinion in *Board of Education* v. *Barnette, supra,* where he says:

> "The very purpose of a Bill of Rights was to *withdraw certain subjects* from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."

In the same case, Mr. Justice Frankfurter, in his dissenting opinion, said:

> "The constitutional protection of religious freedom terminated disabilities, *it did not create new privileges.*"

In the several recent decisions of the Supreme Court on "religious liberty" no distinction in the constitutional sense has been made between the teaching of religion in the church and teaching religion in the schools conducted by the church, or by distribution of religious literature. Logically, there is no real distinction between the church and the religious schools, or between the church and the itinerant preacher or distributor of church pamphlets. In all such instances, the First Amendment, (as now held to be imported into the Fourteenth Amendment), imposes certain restrictions. It is, however, concerned with prohibitions only; the state *must not* prohibit the free exercise; it *must not* make any law respecting an establishment of religion. In other words, the state must not interfere with the exercise of religious practices which do not violate the laws for public order, health, safety or morals. But here the state's duty ends and also its right. The First Amendment no more requires or permits *grants* than it requires or permits *control.* If the state may use public funds to pay the bus fare of children attending religious schools then it may logically pay other expenses, such as maintenance of the school or the printing of the literature. There is no end to the things that may be done, once the right of the state to aid with public funds religious estab-

lishments or those patronizing religious establishments. In the case of religious schools, it is easy to see that such a doctrine might ultimately destroy the public school system, and would cause widespread demands for division of the school funds between the church and the state—between public schools and parochial schools. At most, the state's duty is to furnish the opportunity; the citizen in claiming the right and opportunity to exercise his religious freedom must do so at his own expense. It is interesting to note that this thought was hinted at, at least, by Mr. Justice Reed in the recent case of *Marsh* v. *Alabama*, decided in January of this year. In the dissenting opinion, in which the Chief Justice and Mr. Justice Burton joined, Mr. Justice Reed said:

> "A state does have the moral duty of furnishing the opportunity for information, education and religious enlightenment to its inhabitants, * * * but it has not heretofore been adjudged that it must commandeer, without compensation, the private property of other citizens to carry out that obligation."

The state has performed its full duty when it has made available to all the children of the state free public schools with free transportation thereto. It may not *subsidize* with tax money the parents who elect to withdraw their children from the benefits and privileges of the universal system of public schools. Certainly, *there can be no public benefit derived from public money spent to procure what has already been adequately provided for at public expense.* If, therefore, money be appropriated to pay for a pupil's transportation to a private or parochial school, it is an appropriation of public funds for a fundamentally private purpose, regardless of whether the pupil or the private school is regarded as the beneficiary. In no true sense was the money raised for a public object.

In connection with the use of public funds for a private purpose—aid to private parochial schools, not under the control of public school authorities—it should be pointed

out that such aid will lead inevitably to some form of state control of such religious schools, and thus, more clearly and more certainly, encroach upon the cardinal principle of the separation of church and state.

Gurney v. *Ferguson*, 190 Okla. 254; 122 Pac. 2d 1002.

We close the citation of authorities in this case with a quotation, as a kind of benediction, from *Knowlton* v. *Baumhover*, (1919), 182 Iowa 691, 166 N. W. 202, in which the Court states in cogent language, which can hardly be surpassed in accuracy and clearness, the cardinal principles here contended for:

> "If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state, and that our public school system, supported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer, and infidel—shall not be used directly or indirectly for religious instruction, and above all that it shall not be made an instrumentality of proselyting influence in favor of any religious organization, sect, creed, or belief.
>
> "* * * But, as we have before intimated, the right of a controversy of this kind is not to be decided by a count of the number of adherents on either side. The law and one are a majority, and must be allowed to prevail. The spirit which would make the state sponsor for any form of religion or worship, and the religion, whether Protestant or Catholic, which would *make use of any of the powers or functions of the state to promote its own growth or influence*, are un-American; they are not native to the soil; they are inconsistent with the equality of right and privileges and the freedom of conscience which are essential to the existence of a true democracy."

Finally, it is submitted that the great constitutional safeguards—the mandates of the First and Fourteenth Amend-

ments, embodying the great principles of the separation of church and state and that *public funds* may not be diverted to private uses—should not be lightly whittled away by state enactments masquerading in the garments of police power and sanctioned by the attractive, but fallacious, argument that they are in aid of compulsory education statutes. To lay with one hand the power of the government, in the form of taxation, on the property of one citizen and with the other bestow it upon another citizen in aid, directly or indirectly, of private enterprises cannot be justified under our constitutional mandates, even though it is done under the label and in the name of the public interest. The bills of rights in the American Constitution are conservatory instruments and were intended to secure old principles against abrogation and violation. We are here engaged in an effort to secure old principles from abrogation and violation by invoking the great conservatory and protective limitations of the First and Fourteenth Amendments against a law which amounts, in its practical application, to a diversion of public funds to private uses in the form of indirect aid and support of private and sectarian organizations. It is the first breach, however small, in the Ark of our Covenant that we seek to avert.

It is, therefore, respectfully submitted that the judgment of the lower Court should be reversed.

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Supreme Court of the United States.

OCTOBER TERM, 1946.

No. 52.

ARCH R. EVERSON,
Appellant,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER, ET AL.,
Appellees.

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AS AMICUS CURIAE.

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Subject Index

	Page
Introductory statement	1
I. The Massachusetts statute, its history and its constitutionality generally	2
II. Under the legislation attacked there is no deprivation of property without due process of law	4
III. The appellant's claims that the legislation constitutes the establishment of a religion or interferes with the free exercise of religion examined with reference to the Constitution of Massachusetts and the decisions of the Supreme Judicial Court of Massachusetts	5
IV. The validity of exemptions from taxation of property used for religious purposes granted by Massachusetts statutes would be laid open to question by a decision sustaining the appellant's claims that the legislation under attack constitutes the establishment of a religion or a restraint on the free exercise of religion	12
V. Conclusion	13
Appendix	15
Opinion of the Attorney General of Mass. advising the Legislature that a statute providing for the expenditure of public funds for the transportation of pupils to private schools would be constitutional	15

Table of Authorities Cited.

Cases.

Assessors of Boston v. Lamson, 316 Mass. 166	13
Cochran v. Board of Education, 281 U. S. 370	3
Commonwealth v. Interstate Consolidated St. Ry. Co., 187 Mass. 436	3

Page

Commonwealth v. Kneeland, 20 Pick. 206 (Thacher's Criminal Cases, 346) 8, 9
Interstate Consolidated St. Ry. Co. v. Massachusetts, 207 U. S. 79 3
Jenkins v. Andover, 103 Mass. 94 5
Massachusetts General Hospital v. Belmont, 233 Mass. 190 12
Opinion of the Justices, 195 Mass. 607 12
Opinion of the Justices, 214 Mass. 599 10
Opinion of the Justices to the House of Representatives, June 8, 1946, Mass. Advance Sheets, 1946, p. 799 4

STATUTES.

Mass. General Laws, c. 40, sec. 1 3
Mass. General Laws, c. 40, sec. 5, par. (2) 2
Mass. General Laws, c. 40, sec. 5, par. (40) 4
Mass. General Laws, c. 59, sec. 5, Tenth 13
Mass. Acts of 1936, c. 390 2
Mass. Acts of 1937, c. 185 4
Constitution of Massachusetts, Part I, Article II 5, 8
Constitution of Massachusetts, Part I, Article III 5, 8
Constitution of Massachusetts, Articles of Amendments XI 7
Constitution of Massachusetts, Articles of Amendments XVIII 5, 8
Constitution of Massachusetts, Articles of Amendments XLVI 8
Public Law 849, 76th Cong. 4

TEXTBOOKS.

A Manual for the Constitutional Convention 1917, p. 38 9

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BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AS AMICUS CURIAE.

Introductory Statement.

The Commonwealth of Massachusetts is one of several States which have enacted legislation similar to that the constitutionality of which is questioned in this appeal.

The constitutionality of the Massachusetts legislation is involved in this appeal and the Commonwealth of Massachusetts is directly interested in the case. The Massachusetts legislation was passed only after full consideration was given by its Legislature to the constitutionality of the measure as well as to its need.

Prior decisions of this Court as well as decisions of its own Supreme Judicial Court were relied on by the Massachusetts Legislature in reaching the conclusion that the legislation enacted would be constitutional if enacted.

A decision that legislation such as that in issue cannot be enacted by State Legislatures will not only be a departure from established principles but will prevent the States from making their own provision for transportation of school children according to the conditions existing in each particular State, and in the case of Massachusetts will upset a system of transportation which has been in operation for nearly ten years. In support of the constitutionality of the legislation the Commonwealth of Massachusetts respectfully submits the following arguments which have particular reference to the situation of Massachusetts, and Massachusetts further supports fully the position of the appellees as set forth in their brief, which covers every aspect of the case completely and with a wealth of citation, both case and statutory.

I.

The Massachusetts legislation is contained in Massachusetts General Laws, c. 40, sec. 5, par. (2), which, as amended by chapter 390 of the Acts of 1936 (the amendment being shown in italics), reads as follows:

> "SECTION 5. A town may at any town meeting appropriate money for the following purposes:
>
> . . . . . .
>
> "(2) For the support of public schools authorized or required by law, and for conveying pupils to and from the public schools, or, if it maintains no high school or public school of corresponding grade, but affords high school instruction by sending pupils to other towns, for the necessary transportation expenses of such pupils, the same to be expended by the school committee in its discretion. *Pupils attending private schools of elementary and high school grade, except*

such schools as are operated for profit, in whole or in part, shall be entitled to the same rights and privileges as to transportation to and from school as are provided herein for pupils of public schools."

The power granted by the provision quoted is extended to cities by section 1 of chapter 40 of the General Laws of Massachusetts, which reads in part as follows: "Except as otherwise expressly provided, cities shall have all the powers of towns . . ."

When this legislation was proposed in Massachusetts in 1936 the Legislature, through the Chairman of the Joint Committee on Education, requested an opinion of the Attorney General as to whether the measure, if enacted into law, would be constitutional. In an opinion dated February 17, 1936, which is published in the Report of the Attorney General of Massachusetts for the year ending November 30, 1936, at pages 40-43, and which is set out in full in the Appendix of this brief, the Attorney General, referring to *Commonwealth* v. *Interstate Consolidated St. Ry. Co.*, 187 Mass. 436, 439, affirmed in *Interstate Consolidated St. Ry. Co.* v. *Massachusetts*, 207 U. S. 79, and to *Cochran* v. *Board of Education*, 281 U. S. 370, stated (*infra*, p. 18): ". . . legislation authorizing cities and towns to appropriate and expend money for transportation furnished directly to the children, and not to the schools, would violate no constitutional provision, either State or Federal."

In an opinion rendered under date of December 23, 1936, to the Commission of Education answering certain questions as to the interpretation of the law after it had been enacted, the Attorney General confirmed his earlier opinion as to the constitutionality of the provision. The opinion of December 23, 1936, is published in the Report of the Attorney General of Massachusetts for the year ending November 30, 1937, at pages 37-38.

II.

It seems clear that the legislation under attack is justified, not only as an aid to education, but also as a protection of the health of the children from exposure to the elements as well as from the hazards of traffic. The expenditure of public funds under the authority of such legislation is an expenditure for a public purpose and is not a deprivation of property without due process of law.

If such legislation were to be voided on the ground that the expenditure of funds thereunder was not for a public purpose, much other beneficial legislation, such as that contained in Massachusetts General Laws, c. 40, sec. 5, par. (40), as inserted by St. 1937, c. 185, would come under a cloud. The Massachusetts law referred to authorizes cities and towns to appropriate money "To provide eyeglasses and spectacles for school children eighteen years of age or under who are in need thereof and whose parents or guardians are financially unable to furnish the same."

The Massachusetts school transportation statute, like the New Jersey statute, benefits the child and not the school, and the benefit to the child is entirely subordinate to and incidental to the public purpose of fostering education and the health and safety of the child. Under the principles laid down by this Court and by the Massachusetts Supreme Judicial Court, such legislation is not open to constitutional objection as not being for a public purpose.

In an *Opinion of the Justices to the House of Representatives*, under date of June 8, 1946, reported in Massachusetts Advance Sheets, 1946, pp. 799-808, the constitutionality of a measure to authorize cities and towns to raise and expend public funds and to contract with the Federal Public Housing Authority to procure sites, erect and rent temporary housing for veterans, made available under Public Law 849, 76th Congress, was sustained. The Opinion states that the expenditure of funds provided for by the

proposed statute would be for a public purpose even though individuals as such would profit thereby.

III.

In connection with the claim of the appellant that the New Jersey legislation constitutes an establishment of religion or an interference with the free exercise of religion, the history of the Massachusetts constitutional provisions with regard to religion and the decisions of our Supreme Judicial Court are of interest. This is particularly so because the appellant, through his failure to read the decision of the Supreme Judicial Court of Massachusetts in the case of *Jenkins* v. *Andover,* 103 Mass. 94, in the light of the history of our Constitution, has cited that case as supporting his claims. That case, however, was decided on the basis of a specific provision added to the Constitution of Massachusetts in 1855 (Article XVIII of the Amendments), which has no counterpart in the Constitution of the United States, and the case is not in point. In fact, the Justices of the Supreme Judicial Court of Massachusetts in an opinion which will be referred to hereafter considering the same question that the appellant claims is raised in this appeal, *i.e.,* the validity of appropriations of public funds for schools under sectarian control in view of the constitutional provisions prohibiting laws establishing a religion or restraining the free exercise of religion, reached a conclusion just exactly the opposite of that contended for by the appellant.

Articles II and III of the Declaration of Rights contained in Part the First of the Constitution of the Commonwealth of Massachusetts, as originally adopted, read as follows:

> "II. It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the

SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

"III. [As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of GOD, and of public instructions in piety, religion and morality: Therefore, to promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of GOD, and for the support and maintenance of public Protestant teachers of piety, religion and morality, in all cases where such provision shall not be made voluntarily.

"And the people of this commonwealth have also a right to, and do, invest their legislature with authority to enjoin upon all the subjects an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.

"Provided, notwithstanding, that the several towns, parishes, precincts, and other bodies politic, or religious societies, shall, at all times, have the exclusive

right of electing their public teachers, and of contracting with them for their support and maintenance.

"And all moneys paid by the subject to the support of public worship, and of the public teachers aforesaid, shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the said moneys are raised.

"And every denomination of Christians, demeaning themselves peaceably, and as good subjects of the commonwealth, shall be equally under the protection of the law: and no subordination of any one sect or denomination to another shall ever be established by law.]"

By Article XI of the Amendments to the Constitution of Massachusetts, adopted in 1821, the following article was substituted for the third article of the Bill of Rights:

"Art. XI. Instead of the third article of the bill of rights, the following modification and amendment thereof is substituted.

"'As the public worship of God and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government;—therefore, the several religious societies of this commonwealth, whether corporate or unincorporate, at any meeting legally warned and holden for that purpose, shall ever have the right to elect their pastors or religious teachers, to contract with them for their support, to raise money for erecting and repairing houses for public worship, for the maintenance of religious instruction, and for the payment of necessary expenses: and all persons belonging to any religious society shall be taken and held to be members,

until they shall file with the clerk of such society, a written notice, declaring the dissolution of their membership, and thenceforth shall not be liable for any grant or contract which may be thereafter made, or entered into by such society:—and all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.' "

By Article XVIII of the Amendments to the Constitution of Massachusetts, which was adopted in 1855 and which has since been superseded by Article XLVI of the Amendments, adopted in 1917, it was provided as follows:

"ART. XVIII. [All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools, shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such moneys shall never be appropriated to any religious sect for the maintenance exclusively of its own schools.]"

In the case of *Commonwealth* v. *Kneeland*, 20 Pick. 206, a case upholding the constitutionality of a statute punishing blasphemy, Judge Morton, in an opinion in which he agreed with his colleagues' views as to the constitutionality of the statute but differed from their interpretation, referring to Article III of the Declaration of Rights, states (at page 233), after a reference to Article II:

"It is true that the next article, as it originally stood, did not seem to be perfectly consistent with this.

It appeared to recognize, not only the Christian religion, but one form of it, protestant Christianity, as the established religion, which was to be maintained as well as protected by the power of the government; to the support of which *all* were to be holden to contribute, and upon the ministrations of which *all* were to be compelled to attend. Whether these two articles were reconcilable or not, we have no occasion to inquire. For if the third article ever restrained, or in any way affected, the construction of the second, it has since been abrogated, and the words of the second are now left to have their full and unqualified operation and effect."

See also the charge of Judge Thacher to the jury in the same case in the trial court, reported in Thacher's Criminal Cases (Boston, 1845), at page 346, and the history of the Constitution of Massachusetts contained in "A Manual for the Constitutional Convention 1917" (Boston, 1917), at page 38.

In 1913 the Massachusetts Senate and House of Representatives passed an order that the Opinion of the Justices of the Supreme Judicial Court be required on the following questions of law:

"First. Do the existing provisions of the Constitution of Massachusetts, and especially Article II of Part the First of the Constitution and Article XI of the amendments thereto, adequately prohibit the passing of any law by the General Court establishing any particular religion or restraining the free exercise of any particular religion?

"Second. Do the existing provisions of the Constitution of Massachusetts, and especially Article XVIII of the amendments thereto, adequately prohibit

the appropriation by the Commonwealth or by any county or municipality of money raised by taxation for maintaining or aiding any church, religious denomination or religious society, or any institution, school, society or undertaking which is wholly or in part under sectarian or ecclesiastical control?"

A third question as to the necessity for the adoption of a proposed amendment to the Constitution was also asked.

In their Opinion, which is published in 214 Massachusetts at page 599, the Justices state (p. 601):

"The Constitution of the Commonwealth in several clauses inculcates the practice of religion and urges the public worship of God, as essential means for the perpetuation of republican institutions. But in emphatic and unmistakable terms, it guarantees to all our people absolute freedom as to religious belief and liberty unrestrained as to religious practices, subject only to the conditions that the public peace must not be disturbed nor others obstructed in their religious worship or the general obligations of good citizenship violated. This is clear from art. 2 of the Declaration of Rights and art. 11 of the Amendments, which absolutely prohibit the enactment of any law establishing any particular religion or restraining the free exercise of any particular religion. We answer 'Yes' to the first question.

"So far as the second question relates to the appropriation of money for schools the answer is simple. Article 18 of the Amendments to the Constitution was adopted because of a deep seated conviction of the imperative necessity of preserving the public school system in its integrity and of guarding it from attack or change by explicit mandate. Public schools never have

been understood to include higher institutions of learning like colleges and universities. All moneys raised by taxation for the purpose of expenditure within the sphere of the public or common schools, as these words generally have been understood, must be disbursed exclusively for the support of such schools and cannot be diverted to any other kind of school maintained in whole or in part by any religious sect. But there is no constitutional prohibition of appropriations for higher educational institutions, societies or undertakings *under sectarian or ecclesiastical control. Merrick* v. *Amherst*, 12 Allen, 500. *Jenkins* v. *Andover*, 103 Mass. 94.

"So far as the second question relates to the appropriation of public money for aiding any church, religious denomination or religious society, it presents more difficulty. The Chief Justice and Justices Morton, Braley and De Courcy are of opinion that such an appropriation is prohibited by the Constitution and its Amendments, while Justices Hammond, Loring and Sheldon incline to the opposite conclusion." (Italics supplied.)

It is apparent from the language of the Opinion that the Justices were in full agreement that appropriations of public funds for educational purposes, even if the funds are made available for educational institutions under "sectarian or ecclesiastical support," are not appropriations of public money for aiding any church, religious denomination or religious society, and that appropriations of public funds for educational purposes connected with schools under sectarian control are not violations of constitutional provisions prohibiting the establishment of a religion or laws restraining the free exercise of religion. It is only when specific provisions forbidding such appropriations

are added to the Constitution that any question of their validity arises.

IV.

The appellant's claim that an appropriation of public funds for transportation to private as well as public schools, as applied to schools under sectarian control, is the establishment of a religion or a violation of the constitutional right of all to the free exercise of religion, if sustained, would directly affect the validity of the Massachusetts statutes granting exemptions from taxation to religious societies and schools under sectarian control.

In *Massachusetts General Hospital* v. *Belmont*, 233 Mass. 190, at page 203, the Court says:

> "An exemption from taxation is in the nature of an appropriation of public funds, because, to the extent of the exemption, it becomes necessary to increase the rate of taxation upon other properties in order to raise money for the support of government."

In an *Opinion of the Justices of the Supreme Judicial Court of Massachusetts to the Senate* under date of April 3, 1908, reported in 195 Mass. 607, it is stated at page 608:

> "There are other provisions under which the Legislature has acted, relative to particular subjects which involve taxation or exemption from taxation. The third article of the Declaration of Rights, and article XI. of the Amendments which was substituted for it, recognize the importance of the public worship of God, and of instruction in piety, religion and morality, as promoting the happiness and prosperity of a people and the security of a republican government. Accordingly, taxation for these purposes is authorized.

As taxation to procure property for such uses is permitted, exemption of property so procured is legitimate, under the special provisions of the Constitution touching this subject. We have also constitutional requirements for the encouragement of literature and science, the diffusion of education among the people, and the promotion of 'general benevolence, public and private charity' and other kindred virtues. Const. Mass. c. 5, § 2. As taxation of the people may be imposed for these objects, property used for literary, educational, benevolent, charitable or scientific purposes may well be exempted from taxation. Such exemptions do not prevent the taxation of the people from being proportional and equal."

In the case of *Assessors of Boston* v. *Lamson*, 316 Mass. 166, it was held that the personal property valued at $1,000,000 held by the Trustees of the Christian Science Publishing Society and used in the publication of the Christian Science Monitor and in publishing various religious periodicals and publications dealing with Christian Science was "used or appropriated for religious . . . purposes" within G.L. (Ter. Ed.) c. 59, § 5, Tenth, and was exempt from taxation. No question as to the constitutionality of the statute granting the exemption was raised or considered. Yet it would seem that on the appellant's theory the claim could be made that the statute would be unconstitutional as the establishment of a religion or as interfering with the free exercise of religion.

V.

It is submitted that there is no reason for a decision holding the legislation of New Jersey to be in violation of the Constitution of the United States and that, on the contrary,

the New Jersey statute, and that of Massachusetts and the similar statutes of other States, are valid and constitutional exercises of State authority, and the decision of the Court of Errors and Appeals of New Jersey should be sustained.

Respectfully submitted,

THE COMMONWEALTH OF MASSACHUSETTS,

As *Amicus Curiae*,

By its Attorneys,

CLARENCE A. BARNES,

Attorney General.

JAMES J. KELLEHER,

Of Counsel.

Appendix.

OPINION OF THE ATTORNEY GENERAL OF MASSACHUSETTS ADVISING THE LEGISLATURE THAT A STATUTE PROVIDING FOR THE EXPENDITURE OF PUBLIC FUNDS FOR THE TRANSPORTATION OF PUPILS TO PRIVATE SCHOOLS WOULD BE CONSTITUTIONAL.

FEB. 17, 1936.

Hon. CHARLES G. MILES, *Chairman, Joint Committee on Education.*

DEAR SIR:—You have laid before me House Bill No. 1180, entitled "An Act providing that pupils in parochial schools shall be entitled to transportation to and from said schools in the same manner as pupils in public schools," and Senate Bill No. 282, entitled "An Act providing for the transportation of parochial and private school pupils to and from school."

You seek my opinion as to whether these measures, if enacted into law, would be constitutional.

There is no constitutional limitation upon education in this Commonwealth. Mass. Const. Amend. XLVI does not limit education in any degree. It prescribes no mode or method of education and makes no requirement as to institutions in which education must be received. The education of children is a public purpose. It has long been fostered and encouraged in Massachusetts. The purpose to educate the children of the Commonwealth has become deeply embedded in our traditions. It is at the very bed rock of our institutions. The full measure of the police power of our legislative branch of government may be freely invoked to further the cause and the interests of education. For many years in Massachusetts the education of children has been compulsory. It was said by Mr. Justice Holmes, in *Interstate Consolidated St. Ry. Co.* v. *Massa-*

chusetts, 207 U.S. 79, 83, that education is one of the purposes for which what is called the police power may be exercised, and that Massachusetts has always recognized education as "one of the first objects of public care."

While there is no constitutional limitation upon education itself in this Commonwealth, there is in the Constitution a prohibition as to legislation providing for the support and maintenance of private educational institutions out of public moneys. This prohibition is found in Mass. Const. Amend. XLVI, and concerns not only private schools of common school grade but also all higher institutions of learning conducted under private auspices.

It would seem to be manifestly clear that there are matters incidental or kindred to the education of children with reference to which the Legislature may exercise the law-making power without violation of any constitutional mandate. The providing of transportation for children to and from public and private schools out of public moneys appropriated by cities and towns is one of them. Legislation to that end within the scope hereinafter set forth would be constitutional.

The principal test to be applied to such legislation is this: If the legislation contemplates making provision directly or indirectly for the support and maintenance, in whole or in part, of private schools out of public moneys it is unconstitutional. If the purpose of the legislation, however, is to provide a benefit directly to the children attending private schools of common school grade, like the furnishing of transportation to and from school out of public moneys, the legislation is constitutional.

The terms "parochial schools" and "private schools" as they appear in the text of the proposed legislation which you have submitted to me I interpret to mean schools which have an attendance of pupils in the same class as those in attendance at public schools established in accordance with

G. L. (Ter. Ed.) c. 71, §§ 1 and 4. These terms, "parochial schools" and "private schools," as contemplated by the proposed legislation, would not include schools of theology, law, medicine, dentistry, music, art, architecture, agriculture and many others devoted to technical or specialized training. With reference to the proposed legislation, "students in these schools are not in the same class with pupils in public schools. . . . The public schools . . . are intended to provide general instruction for all children and youth." *Commonwealth* v. *Connecticut Valley St. Ry. Co.*, 196 Mass. 309, 312.

Mass. Const. Amend. XLVI, which was substituted for Mass. Const. Amend. XVIII, permits no broader powers to be granted under legislative sanction to cities and towns with reference to educational purposes than might have been granted under the earlier article. V Op. Atty. Gen. 204. Under the earlier article it was held by a former Attorney General that it would be unconstitutional for a town to vote and grant money to pay the tuition of children attending an academy in the town or to pay the tuition of children attending an academy outside of the town. I Op. Atty. Gen. 319. Prior to the adoption of Mass. Const. Amend. XLVI it was held by our Supreme Judicial Court that, under legislative sanction, money might be appropriated by cities and towns for conveying pupils to and from the public schools. Calling attention to the fact that compulsory attendance of children in the schools is provided for by our laws (R. L. c. 44, § 1; now G. L. [Ter. Ed.] c. 76, §§ 1 and 2), the court said that it was within the province of the Legislature to "concern itself with the transportation of children to the public schools in the interest of popular education, just as it provides such children with books and other necessary articles." *Commonwealth* v. *Interstate Consolidated St. Ry. Co.*, 187 Mass. 436, 439, affirmed in *Interstate Consolidated St. Ry. Co.* v. *Massachusetts*,

207 U. S. 79. Where a statute provided for half fares for children attending private as well as public schools, in traveling to and from school, the constitutionality of the statute was sustained. *Commonwealth* v. *Connecticut Valley St. Ry. Co.*, 196 Mass. 309. In that case it was held that the statute included within its scope pupils in private schools, within the meaning of R. L. c. 42, §§ 1 and 2 (now G. L. [Ter. Ed.] c. 76, §§ 1 and 2), but did not include pupils in certain other private schools which were operated by owners for profit. See also *Selectmen of Clinton* v. *Worcester Consolidated St. Ry. Co.*, 199 Mass. 279, 290; V Op. Atty. Gen. 507, 509; *Commonwealth* v. *Boston & Northern St. Ry. Co.*, 212 Mass. 82.

The intended benefit sought by the proposed legislation, upon which you seek my opinion, is a benefit intended for children attending parochial and other private schools, as distinguished from a benefit intended for the schools themselves. In no sense under the terms of the legislation would the schools receive any aid or support or acquire any property rights out of the expenditure of public moneys, the use of public property, or the use of public credit. *Cochran* v. *Board of Education*, 281 U. S. 370. The end sought by the legislation has no relation whatever to the founding, maintaining or supporting of private schools.

The intended purpose of the proposed legislation is a public purpose clearly within the province of the police power of the Legislature. Legislation, however, authorizing the payment of money directly to private schools for transportation of children, thereby in effect lightening the burden of operating expenses of such schools, would be unconstitutional. It would violate Mass. Const. Amend. XLVI. But legislation authorizing cities and town to appropriate and expend money for transportation furnished directly to the children, and not to the schools, would violate no constitutional provision, either State or Federal.

The plain intent of the constitutional provision (Mass. Const. Amend. XLVI) is to prohibit the appropriation or use of public moneys, property or credit for the founding, maintaining or support, in whole or in part, of private as distinguished from public schools. That was the main object, with reference to educational institutions, sought to be accomplished by its adoption. Parochial schools, as well as other private schools, manifestly come within the sweep of this amendment. The use of public moneys, property or credit for the founding, maintenance or support of private schools, in whole or in part, would be clearly unconstitutional.

There appears to be nothing repugnant to the provisions of Mass. Const. Amend. XLVI in legislation authorizing the appropriation of public moneys by cities and towns for the purpose of transporting children to and from school. Legislation authorizing the appropriation of public moneys by cities and towns for this purpose for public schools has withstood the test of many years before and since the adoption of the constitutional amendment under consideration, because such legislation is constitutional. It would be absurd and futile to question it on constitutional grounds. Under the proposed legislation money would not be paid to the schools for transportation, thereby in any case lightening their burdens of operating expenses, but the transportation would be furnished directly to the children by the cities and towns making appropriations therefor. Nothing would go into the treasuries of private schools, for such a course would be illegal and unconstitutional.

The conservation of the health and the protection of the safety of children attending school are important factors to be taken into consideration. They are matters of public concern and vitally affect the interests of the public. The proposed legislation does not merely benefit the children; it benefits the public as well. It authorizes the appropria-

tion and expenditure of public moneys by cities and towns for a public purpose. *Commonwealth* v. *Boston Advertising Co.*, 188 Mass. 348, 352.

I am therefore of opinion that there is no constitutional objection to either House Bill No. 1180 or to Senate Bill No. 282.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

FILE COPY

OCT 10

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 52

ARCH R. EVERSON,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER, *et al.*,

Appellees.

BRIEF AND ARGUMENT OF ILLINOIS AND INDIANA AS AMICI CURIAE.

GEORGE F. BARRETT,
Attorney General of the State of Illinois.

JAMES A. EMMERT,
Attorney General of the State of Indiana.

WILLIAM C. WINES,
Assistant Attorney General
of the State of Illinois,
Of Counsel.

CHAMPLIN-SHEALY COMPANY, CHICAGO 365

INDEX.

PAGE

CASES AND STATUTES CITED.

Illinois Rev. Statutes, 1945, Ch. 122, Par. 29-7 2

Burns' Indiana Statutes, Ann. 1933, Sec. 28-595 2

Chance v. Mississippi State Board, 190 Miss. 453, 200 So. 706, 709 4

Cochrane v. Louisiana, 281 U. S. 370 3

Queenside Hills Realty Co. v. Saxl, 90 L. ed. 840, 327 U. S. 6

Pierce v. Society of Sisters, 268 U. S. 510 2

ARGUMENT

I. The New Jersey Statute Does Not Violate the Constitution of the United States 2

II. The Administrative Promulgation of the New Jersey Board was Valid 5

Conclusion 7

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BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER, *et al.*,

Appellees.

BRIEF AND ARGUMENT OF ILLINOIS AND INDIANA AS AMICI CURIAE.

ARGUMENT.

Illinois and Indiana join the appellees and other *amici curiae* in submitting that the judgment of the New Jersey Court of Errors and Appeals should be affirmed on the ground that the legislation in question is constitutional and that the administrative promulgation of the Ewing Board of Education, properly construed in the light of the facts shown by the record, is valid as against appellant's attack upon it.

Illinois and Indiana have statutes, cited in the margin *, that authorize the transportation of school children to both public and private schools, including parochial schools. These statutes enact the same public policy that finds utterance in the New Jersey statute, although the Illinois and Indiana statutes do not contemplate the direct reimbursement of parents for bus fares expended.

Invalidation by this court of the New Jersey statutes would gravely compromise the educational programs of Illinois and Indiana. Inasmuch as these policies are of long standing, presently unquestioned in these states and of undoubted public benefit, we have felt it appropriate to make this short presentation in this case.

I.

The New Jersey Statute Does Not Violate the Constitution of the United States.

This court is already committed to the following principles of constitutional doctrine, none of which appellant seeks to repudiate:

First: A state not only *may* recognize juvenile education at a parochial school that meets the state's secular standards as a substitute for similar education at a public school. It *must* do so in order to avoid unconstitutional violation of parents' and children's freedom of religion.

Pierce v. *Society of Sisters*, 268 U. S. 510.

---

* Illinois Statutory Provision: (Illinois Rev. Statutes, 1945, Ch. 122, Par. 29-7.)
Indiana Statutory Provision: (Burns' Indiana Statutes, Ann., 1933, Sec. 28-595.)

Second: A state may furnish textbooks purchased and supplied at the state's expense to pupils in parochial and other private schools (provided, of course, that it also furnishes such textbooks to students enrolled in public schools).

Cochrane v. *Louisiana*, 281 U. S. 370.

It is unquestioned that a state may make it a crime on the part of parents not to send their children to school, and may punish a child for truancy. Therefore this court could not reverse the judgment under review without declaring that a state may not help a child to do what it compels him to do, namely, attend either a public or an approved private school, secular or parochial, as his parents may choose.

We think that the considerations briefly noted above put the instant question in its true posture. When it is conceived in that posture, it will be seen that this case does not present any question of authoritarian establishment or aid of religion at public expense; for the right of children to attend parochial schools and the right of the state to aid them to do so by tax exemption and free textbooks is already established by this court's decisions and is an important fact in the nation's history.

At least fifteen other states have enacted legislation making provision at public expense in one way or another for the transportation of children to both public and private, including parochial, schools. (See Appellees' Brief for a compilation of these laws.)

The passage of bills by fifteen states or even by forty-eight states cannot make constitutional that which is plainly obnoxious to the organic law of the land. But if the question is doubtful, the concurrence of many state

legislatures, all of whose members are sworn to obey the federal constitution in enacting similar legislation, is an eloquent practical construction of the federal constitution by those whom it entrusts with legislative powers. Such a construction is, we submit, entitled to the greatest respect by this court. This consideration is the real justification for the presumption in favor of the constitutionality of the act of even a single state legislature.

We do not further protract this short brief because the brief for respondents ably and fully develops the considerations that in our earnest view require an affirmance of the New Jersey court's judgment.

We briefly note and emphasize, however, that, as shown in appellees' brief, tax exemption of parochial schools is a grant far more direct, far more important to the school, and far more costly to the public than is mere transportation without the payment of a cent to the school by the pupils who attend it. Yet the constitutionality of such exemption is unquestioned because private schools, including parochial schools, discharge at their own expense a great responsibility of the state that would otherwise have to be paid for by public funds.

"If the pupil may fulfill its duty to the state by attending a parochial school," said the Supreme Court of Mississippi in *Chance* v. *Mississippi State Board*, 190 Miss. 453, 200 So. 706, 709, "it is difficult to see why a state may not fulfill its duty to the pupil by encouraging it 'by all suitable means.' The state is under duty to ignore the child's creed but not its need."

II.

The Administrative Promulgation of the New Jersey Board Was Valid.

The New Jersey Board's administrative provision for the transportation of pupils to public and parochial schools was assailed below because it provides for transportation to the particularly named schools of a single denomination named in the resolution and does not explicitly contemplate provision for transportation to schools of other denominations. We of course concede that if a state furnishes free transportation to schools of any religious sect, it must provide such transportation to all sectarian schools that meet the state's requirements for secular education of children of the same age group. We concede, too, that the New Jersey Board's regulation would be unconstitutional if in fact there were schools of other denominations, or even another accredited school of the same denomination, within the Board's territory and otherwise *in similare statu* to the school named in the regulation unless the pupils of such school were afforded the "equal protection" of free transportation.

But the facts shown by the record are that there was no other private school, either denominational or non-sectarian, within the Board's district and jurisdiction. Such a generic phrase as "all accredited elementary private schools conducted not for profit," if it had been inserted in the promulgation instead of the names of the schools in question would have meant only the present schools for there were no others in the district.

We have no doubt that if another private school qualifies for accreditation, the text of the regulation in question

will be revised to include it, either in generic terms or by specific designation. Should the New Jersey Board insist on preferring one accredited private school over another on any grounds other than those of adequacy or inadequacy of the institutions by secular educational standards, any court in the United States would strike such action down.

But unconstitutional discrimination does not exist unless the facts, regardless of the diction of the statute or other regulatory measure, give rise in such discrimination.

This court's recent decision in *Queenside Hills Realty Co.* v. *Saxl*, 90 L. ed. 840, 327 U. S. ..., is conclusive. In that case, the text of the law was such as to give rise to the charge that it unconstitutionally discriminated in favor of rooming houses that should be built after it was passed and against rooming houses that were in existence at the time of the bill's enactment. This court refused to consider the question because it did not appear from the record that in fact any building of the type contemplated by the law had been built since its passage. The court indicated that, should such buildings be erected and should discrimination occur in the future, the question as to whether the discrimination was reasonable would then be considered. Similarly, in the instant case, should invidious discriminations grounded upon sectarian preferment or other unconstitutional bases of classification occur in the future, it will be time enough for this court or some lower court to interfere.

Conclusion.

For the reasons suggested in this brief and argued in the briefs of appellees, as well as those of other *amici curiae*, Illinois and Indiana respectfully submit that the judgment under advisement should be affirmed.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois.

JAMES A. EMMERT,
Attorney General of the State of Indiana.

WILLIAM C. WINES,
Assistant Attorney General
of the State of Illinois,
Of Counsel.

COPY

OCT. 19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 911

ARCH R. EVERSON,
Appellant,

VERSUS

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL.,
Appellees.

Appeal from the Court of Errors and Appeals of the State of New Jersey.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

FRED S. LEBLANC,
Atty. Gen. of Louisiana,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 911

ARCH R. EVERSON,
Appellant,

VERSUS

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL.,
Appellees.

Appeal from the Court of Errors and Appeals of the State of New Jersey.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

To the Honorable, the Supreme Court of the United States:

The undersigned, as Attorney General of the State of Louisiana, respectfully moves the Court for permission to file the following brief as amicus curiae herein for the reason that this case involves the right of a state to furnish free transportation to children attending private and

parochial schools, as well as public schools, and that the final decision in this case may affect the State of Louisiana, whose legislature has authorized the parish school boards of the state to furnish such transportation to the children of the state attending not only the public schools but also such private and parochial schools as may be approved by the State Board of Education. Louisiana Act 100 of 1922, Sec. 29, as amended by Act 185 of 1944; Louisiana Constitution, Art. XII, Sec. 7.

The attorneys for the appellees have consented in writing to the filing of a brief by the undersigned.

FRED S. LE BLANC,
Attorney General of Louisiana
Amicus Curiae.

Baton Rouge, Louisiana
October 11, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 911

ARCH R. EVERSON,

Appellant,

VERSUS

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL.,

Appellees.

Appeal from the Court of Errors and Appeals of the State of New Jersey.

BRIEF IN SUPPORT OF APPELLEES' POSITION.

SUBJECT INDEX

	Page
Louisiana's Interest	5
Argument	6

CASES CITED

Adams v. County Commissioners of St. Mary's County, (Md.) 26 Atl. 2d 377	7
Board of Education of Baltimore County v. Wheat, (Md.), 199 Atl. 628	6

Borden v. Louisiana State Board of Education, 168 La. 1005, 123 So. 655, 67 A. L. R. 1183 5

Chance v. Mississippi State Textbook R. & P. Board (Miss.), 200 So. 706 6

Cochran v. Louisiana State Board of Education, 281 U. S. 370, 50 S. Ct. 335, 74 L. Ed. 913 affirming 168 La. 1030, 123 So. 664 5

LAWS CITED

La. Constitution, Art. 12, Sec. 7 2

La. Act 100 of 1922, Sec. 29, as amended by Act 185 of 1944 5

La. Acts 100 of 1928 and 143 of 1928 6

May It Please the Court:

The importance of this case to the State of Louisiana is that, under the provisions of Section 29 of Act 100 of 1922, as last amended by Act 185 of 1944, the school boards of the several parishes of the State of Louisiana are authorized "to provide transportation for children attending *any* school approved by the State Board of Education and living more than one mile from such a school of suitable grade;***." (Emphasis mine).

It is provided in the last paragraph of Section 7 of Article XII of the Constitution of Louisiana, adopted in 1921, that the State Board of Education "shall have authority to approve private schools and colleges, whose sustained curriculum is of a grade equal to that prescribed for similar public schools and educational institutions of the State."

The parish school boards under this authority are providing transportation for school children attending private and parochial schools, and their constitutional right to do so has been taken for granted by Louisiana school authorities, as well as by the office of the Attorney General of Louisiana, since the kindred cases of *Borden v. Louisiana State Board of Education*, 168 La. 1005, 123 So. 655, 67 A.L.R. 1183, and *Cochran v. Louisiana State Board of Education*, 168 La. 1030, So. 664, *affirmed, 281 U. S. 370, 50 S. Ct. 335, 74 L. Ed. 913*, were decided.

These cases were concerned with the furnishing, free of cost to the school children of the State of Louisiana attending public, private or parochial schools, of school books under the provisions of Act 100 of 1928 and Act 143 of 1928. In neither case did the State Supreme Court find anything repugnant to either the State or the Federal Constitutions. The Cochran case was appealed to the Supreme Court of the United States and there it was held by a unanimous decision that these legislative acts did not offend the Federal Constitution because the taxing power of the state was being used for a public purpose and that:

> "The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded."

I can perceive no difference in principle between the constitutional right of a state to supply school books to school children generally and its right to furnish transportation for them. The children themselves in both cases are the beneficiaries and not the schools they happen to attend. That view, expressed in the Borden and Cochran cases is shared by the Supreme Courts of Mississippi and Maryland. *Chance v. Mississippi State Textbook R. & P. Board*, 200 So. 706; *Board of Education of Baltimore County*

v. Wheat, 199 Atl. 628; *Adams v. County Commissioners of St. Mary's County*, 26 Atl. 2d 377.

Respectfully submitted,

FRED S. LEBLANC,
Attorney General of the State
of Louisiana Amicus Curiae.

October, 1946.

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United States of America

In the Supreme Court of the United States

October Term 1946

No. 52

Arch R. Everson,
Appellant,

v.

Board of Education of Township of Ewing, et al.,
Respondents.

Brief of Attorney General of Michigan as Amicus Curiae.

Foss O. Eldred,
Attorney General for the State of Michigan.

Edmund E. Shepherd,
Solicitor General for the State of Michigan.

Daniel J. O'Hara,
Assistant Attorney General for the State of Michigan.

Amicus Curiae.

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United States of America

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October Term 1946

No. 52

Arch R. Everson,
Appellant,

v.

Board of Education of Township of Ewing, et al.,
Respondents.

Brief of Attorney General of Michigan as Amicus Curiae.

We do not have a copy of the record or briefs in the case at bar and because of the shortness of time before argument and because our legislature has adopted similar legislation to that of New Jersey we hasten to state our position on the constitutionality of the statute here challenged.

Our statute, Sec. 15.457, Mich. Stats. Ann., 1945 Cum. Supp. reads as follows:

> "The board of education of any school district may enter into a contract with any other district or with private individuals to furnish transportation for non-resident pupils attending such school or attending public schools in other districts: *Provided, however,* That in no event may the price paid for such transportation be less than the actual cost thereof to the district fur-

nishing the same. The district board or board of education of any school district may furnish transportation for resident pupils to educational programs at county or community fairs, to health clinics in or outside of the school district, and to educational functions in any other school district or community. Any board furnishing transportation may purchase buses on contract, pledging money in the general fund or funds received from appropriations from the general fund of the state for aid in the support of the public schools.

"The board of education of any school district which furnishes transportation for resident pupils may furnish transportation for children residing within the district who attend private or parochial schools of elementary or high school grades: *Provided*, That such schools comply with the provisions of Act No. 302 of the Public Acts of 1921. Such children may be transported without charge along the regular route of the public school bus or conveyance nearest or most easily accessible to their homes, to such private or parochial school or to the point along such regular route which is nearest or most accessible to such private or parochial school: *Provided*, That nothing contained in this section shall be construed to require or permit transportation of pupils to a private or parochial school attending in the primary grades where such transportation is furnished by the district for high school pupils only, nor to require or permit the transportation of pupils to a private or parochial school attending the high school grades where such transportation is furnished by the district for primary pupils only."

Former Attorney General Thomas Read on March 14, 1939, in an opinion addressed to Hon. Joseph A. Baldwin, of the Michigan State Senate, exhaustively considers the

constitutionality of a proposed House Bill permitting the transportation to and from school of pupils attending private or parochial schools.

We print the opinion as Appendix 'A'.

The opinion referred to is still the opinion of the Attorney General of Michigan.

We regret that the pressure of time prevents us from analyzing and appraising the decisions dealing with the subject matter here involved but several law review articles and case comments thoroughly discuss the cases, and we refer to such articles in a bibliography, Appendix 'B'.

Conclusion

We respectfully submit that in view of the fact that this court has upheld the expenditure of public funds to supply textbooks to students in parochial schools that the statute here challenged should be sustained and that the Fourteenth Amendment does not prohibit the enactment of legislation of the type enacted in New Jersey or Michigan.

Respectfully submitted,

Foss O. Eldred,
Attorney General for the State of Michigan.

Edmund E. Shepherd,
Solicitor General for the State of Michigan.

Daniel J. O'Hara,
Assistant Attorney General for the State of Michigan.

Appendix 'A'

March 14, 1939.

Hon. Joseph A. Baldwin,
Michigan State Senate,
Lansing, Michigan
Dear Senator Baldwin:

You have requested my opinion on the constitutionality of House Bill No. 66, which is a bill to amend Section 20 of chapter 2 and section 20a of chapter 5 of part 2 of Act No. 319 of the Public Acts of 1927 (School Code).

The amendments in both sections consist of added matter. For convenience, I am setting forth the sections in full with the added matter in capital letters:

Part II

Chapter II

"Sec. 20. No school district shall apply any of the moneys received by it from the primary school interest fund or from any and all other sources for the support and maintenance of any school of a sectarian character, whether the same be under the control of any religious society or made sectarian by the school district board. THE PROVISIONS OF THIS SECTION SHALL NOT BE CONSTRUED TO PROHIBIT THE TRANSPORTATION TO AND FROM SCHOOL OF PUPILS ATTENDING PRIVATE OR PAROCHIAL SCHOOLS AS PROVIDED IN SECTION 20a, PART 2 OF THIS ACT.

Chapter V

"Sec. 20a. The board of education of any school district may enter into a contract with any other district to furnish such transportation for non-resident pupils attending such school: Provided, however, That in no event may the price paid for such transportation be less than the actual cost thereof to the district furnishing the same. The district board or board of education of any school district may furnish transportation for resident pupils to educational programs at county or community fairs, to health clinics in or outside of the school district, and to educational functions in any other school district or community. Any board furnishing transportation may purchase buses on contract, pledging funds received from Act No. 236 of the Public Acts of 1933, as amended.

"THE BOARD OF EDUCATION OF ANY SCHOOL DISTRICT WHICH FURNISHES TRANSPORTATION FOR RESIDENT PUPILS MAY FURNISH TRANSPORTATION FOR CHILDREN RESIDING WITHIN THE DISTRICT WHO ATTEND PRIVATE OR PAROCHIAL SCHOOLS OF ELEMENTARY OR HIGH SCHOOL GRADES: PROVIDED, THAT SUCH SCHOOLS COMPLY WITH THE PROVISIONS OF ACT NO. 302 OF THE PUBLIC ACTS OF 1921. SUCH CHILDREN MAY BE TRANSPORTED WITHOUT CHARGE ALONG THE REGULAR ROUTE OF THE PUBLIC SCHOOL BUS OR CONVEYANCE NEAREST OR MOST EASILY ACCESSIBLE TO THEIR HOMES, TO SUCH PRIVATE OR PAROCHIAL SCHOOL OR TO THE POINT ALONG SUCH REGULAR ROUTE WHICH IS NEAREST OR MOST ACCESSIBLE TO SUCH PRIVATE OR PAROCHIAL SCHOOL: PROVIDED, THAT NOTH-

ING CONTAINED IN THIS SECTION SHALL BE CONSTRUED TO REQUIRE OR PERMIT TRANSPORTATION OF PUPILS TO A PRIVATE OR PAROCHIAL SCHOOL ATTENDING IN THE PRIMARY GRADES WHERE SUCH TRANSPORTATION IS FURNISHED BY THE DISTRICT FOR HIGH SCHOOL PUPILS ONLY, NOR TO REQUIRE OR PERMIT THE TRANSPORTATION OF PUPILS TO A PRIVATE OR PAROCHIAL SCHOOL, ATTENDING THE HIGH SCHOOL GRADES WHERE SUCH TRANSPORTATION IS FURNISHED BY THE DISTRICT FOR PRIMARY PUPILS ONLY."

Under the law as it now stands, transportation cannot be furnished to other than public schools, for the reason that the legislature has not yet authorized such transportation. Bates Township School District v. Elliott, 276 Mich. 575.

Section 1 of Article XI of the Constitution of Michigan reads as follows:

> "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

Section 9 of the same article provides in part:

> "The legislature shall continue a system of primary schools, whereby every school district in the state shall provide for the education of its pupils without charge for tuition; and all instruction in such schools shall be conducted in the English language. * * *."

Section 3 of Article II of the same document reads as follows:

"Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief."

Section 12 of Article X of the same document reads as follows:

"The credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private."

The above are the only constitutional provisions having any bearing on the question under discussion.

Under our Constitution, the Legislature has control over the schools.

Stuart v. School District, 30 Mich. 69;

Perrizo v. Kesler, 93 Mich. 280;

Pingree v. Board of Education, 99 Mich. 404;

Attorney General v. Lowrey, 131 Mich. 639;

Attorney General v. Board of Education, 154 Mich. 584;

Attorney General v. Connolly, 193 Mich. 499;

Collins v. City of Detroit, 195 Mich. 330;

Child Welfare Society v. Kennedy School District, 220 Mich. 290;

Van Fleet v. Oltman, 244 Mich. 241;

Bates Township School District v. Elliott, supra;

In re School District No. 6, 284 Mich. 132.

Acts of the legislature should not be declared unconstitutional unless it clearly appears that they violate some provision of the Constitution.

Attorney General v. Preston, 56 Mich. 177.

This case involved the constitutionality of an act of the legislature of 1875. I quote from page 179 of the opinion:

> "And the question is now presented, in what respect and to what extent, has the Constitution limited this power of the Legislature? In the examination of this question it is to be borne in mind that before a law can be held invalid, it must be a plain violation of some provision contained in the Constitution. Scott v. Smart's Ex'rs., 1 Mich. 307; People v. Gallagher, 4 Mich. 244; People v. Blodgett, 13 Mich. 127; People v. Mahaney id. 481; Whallon v. Ingham Circuit Judge, 51 Mich. 503. 'In cases of doubt every possible presumption not clearly inconsistent with the language and subject-matter is to be made in favor of the constitutionality of the act' in question. Sears v. Cottrell, 5 Mich. 259; Tabor v. Cook, 15 Mich. 323; Ogden v. Saunders, 12 Wheat. 270; Cooley's Const. Lim. and cases cited at page 182."

This rule has been followed by the Supreme Court down to the present time.

Albert v. Gibson, 141 Mich. 698;

Attorney General v. Connolly, supra;

Fremont Canning Co. v. Waters, 209 Mich. 178;

Child Welfare Society v. Kennedy School District, supra;

Thompson v. Auditor General, 261 Mich. 624;

Fortner v. Koch, 272 Mich. 273.

Our Supreme Court has held that the use of school rooms and the time of the teacher in reading excerpts from the Bible for fifteen minutes at the close of each day's session, did not violate the constitutional provision now found in Section 3 of Article II of the Constitution quoted above. Pfeiffer v. Board of Education, 118 Mich. 560.

Section 1, Chapter 17, Part 2 of Act No. 319, Public Acts of 1927, being Section 7526, Compiled Laws of 1929, provides in part:

"Except as provided in section 2 of this chapter, every parent, guardian or other person in the state of Michigan, having control and charge of any child between the ages of seven and sixteen years, shall be required to send such child, equipped with the proper textbooks necessary to pursue his or her school work, to the public schools during the entire school year, and such attendance shall be continuous and consecutive for the school year fixed by the district in which such parent, guardian, or other person in parental relation may reside: * * *."

Section 2, being Section 7527, Compiled Laws of 1929, provides in part:

> "In the following cases children shall not be required to attend the public schools:
>
> "(a) Any child who is attending regularly and is being taught in a private, parochial, or denominational school which has complied with all the provisions of this act and teaches such branches as are taught in the public schools to children of corresponding age and grade as determined by the course of study for the public schools of the district within which such private, denominational, or parochial school is located, or who upon the completion of the work in such schools, shall hold an eighth grade diploma granted by the county commissioner of schools, or in appropriate cases a statement from the superintendent of schools that he has completed sufficient work to entitle him to an eighth grade diploma; * * *".

Act No. 302 of the Public Acts of 1921, being Sections 8151-8157, inclusive, Compiled Laws of 1929, is, as indicated by its title, an act to provide for the supervision of private, denominational and parochial schools; to provide the manner of securing funds in payment of the expense of such supervision; to provide the qualifications of the teachers in such schools; and to provide for the endorsement of the provisions hereof.

The use of public funds for the purpose of purchasing books for children attending parochial school is not in violation of the constitutional provision against taking money from the treasury directly or indirectly in aid of any church, sect, or denomination of religion, or using of public funds for the support of any private or sectarian school.

Borden v. State Board of Education, 168 La. 1005; 123 So. 655; 67 A.L.R. 1183. This was an injunction proceedings to restrain the providing of free textbooks out of public funds for the use of pupils attending private or parochial schools. The case was affirmed by the Supreme Court of the United States in Cochran v. State Board of Education, 281 U. S. 370, 74 L. Ed. 913. The opinion was written by Justice Hughes, and I quote from pages 914 and 915 of the opinion as reported in 74 L. Ed.:

> "The appellants, as citizens and taxpayers of the state of Louisiana, brought this suit to restrain the state board of education and other state officials from expending any part of the severance tax fund in purchasing school books and in supplying them free of cost to the school children of the state, under Acts No. 100 and No. 143 of 1928, upon the ground that the legislation violated specified provisions of the Constitution of the state, and also § 4 of article 4 and the 14th Amendment of the Federal Constitution. The supreme court of the state affirmed the judgment of the trial court which refused to issue an injunction. 168 La. 1030, 123 So. 644.
>
> "Act No. 100 of 1928 provided that the severance tax fund of the state, after allowing funds and appropriations as required by the state Constitution, should be devoted, 'first, to supplying school books to the school children of the state.' The board of education was directed to provide 'school books for school children free of cost to such children.' Act No. 143 of 1928 made appropriations in accordance with the above provisions.
>
> "The supreme court of the state, following its decision in Borden v. Louisiana State Bd. of Education,

168 La. 1005, 67 A.L.R. 1183, 123 So. 655, held that these acts were not repugnant to either the state or the Federal Constitution.

"No substantial Federal question is presented under § 4 of article 4 of the Federal Constitution guaranteeing to every state a republican form of government, as questions arising under this provision are political, not judicial, in character. Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. decided March 12, 1930 (281 U. S. 74, ante, 710, 66 A.L.R. 1460, 50 Sup. Ct. Rep. 228), and cases there cited.

"The contention of the appellant under the 14th Amendment is that taxation for the purchase of school books constituted a taking of private property for a private purpose. Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. Ed. 455. The purpose is said to be to aid private, religious, sectarian and other schools not embraced in the public educational system of the state by furnishing textbooks free to the children attending such private schools. The operation and effect of the legislation in question were described by the supreme court of the state as follows (168 La. p. 1020, 67 A.L.R. 1183, 123 So. 655):

" 'One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books

are to be furnished them for their use free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children. . . What the statutes contemplate is that the same books that ar furnished children attending public schools, shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected adapted to religious instruction.'

"The court also stated, although the point is not of importance in relation to the Federal question, that it was 'only the use of the books that is granted to the children, or, in other words, the books are lent to them.'

"Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools or their pupils, as its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

Our Supreme Court has never passed upon the question as to whether or not the furnishing of transportation for

pupils attending a public school constitutes an appropriation of public money for the benefit of a religious sect or society, theological or religious seminary, or the payment of taxes for the support of a teacher of religion. They have, however, held that, as indicated above, the use of the time of a teacher in a school room for fifteen minutes each day for the purpose of reading excerpts from the Bible would not constitute such violation of the Constitution. Pfeiffer v. Board of Education, supra.

The Court of Appeals of Maryland, on May 20, 1938, held constitutional an act of the legislature providing that children attending schools not receiving State aid should be entitled to transportation on school buses on the same terms as public school children. Board of Education of Baltimore County v. Wheat, 199 Atl. 628. This case is of particular interest here because the decision is based principally upon the proposition that it is in furtherance of education based upon the compulsory education laws which are similar to such provisions in our statute. See Chapter 17, Part 2, Act No. 319, Public Acts of 1927, being Sections 7526 to 7550, Compiled Laws of 1929. I quote from page 632 of the opinion of the court written by Chief Justice Bond:

> "Starting with the interest which the state is acknowledged to have in seeing that all children of school age acquire an education by attending some school, and the fact that they are complying with the law in going to such a school as the parochial school involved in this case, their accommodation in the buses appears to the court to be within the proper limits of enforcement of the duty imposed. Compliance having been made dangerous in a much greater degree, removal of the danger to any extent would seem to be within the same public function. Even though the statute ordering it may be open to another interpretation, if the trans-

portation with this object is a constitutional action, the statute must be construed as having the object, because the court is required to admit the constitutionality of an act of assembly if it can be brought within the exercise of any constitutional power. Keiningham v. Blake, 135 Md. 320, 322, 109 A. 65, 8 A.L.R. 1066; Painter v. Mattfeldt, 119 Md. 466, 472, 87 A. 413. The danger of perversion to private purposes may be admitted, but the Legislature is primarily entrusted with the care of that, and the courts have no duty in relation to it unless and until a perversion should be obvious. The fact that the private schools, including parochial schools, receive a benefit from it could not prevent the Legislature's performing the public function.

"This conclusion that the act must be regarded as one within the function of enforcing attendance at school, renders it unnecessary to consider separately the objection that a religious institution is aided. Art. 36, Declaration of Rights. The institution must be considered as aided only incidentally, the aid only a by-product of proper legislative action."

Judge Sloan, in a concurring opinion, after quoting at length from the compulsory school law, concludes:

"It will thus be seen that the State exercises its control over the education and compels the attendance at school of all children from seven to sixteen years of age, whether they attend public or private schools, and the provision for transportation to and from consolidated schools (Code, art. 77, sec. 50) is an aid to the end and purpose of the compulsory school laws. On this theory, and, in my opinion, only on this theory can the Acts of 1937, chapter 185, be sustained."

The Supreme Court, Special Term, Nassau County, New York, on November 9, 1937, held that transportation furnished students of schools other than public, pursuant to statutory authority, is not in aid of or maintenance of a denominational school, in violation of the constitutional prohibition, but is a service independent of the school itself, intended solely for the convenience of the pupils and to promote their education. Judd v. Board of Education, 300 N.Y.S. 1037. This case, however, was reversed by the Court of Appeals of New York in Judd v. Board of Education of Union Free School District, 278 N. Y. 200, 15 N.E. (2d) 576. The court based its decision on Section 4, Article 9 of the Constitution of New York, which reads as follows:

> "Neither the State nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught."

I quote from page 582 of the opinion as reported in 15 N.E. (2d):

> "The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils. That argument is utterly without substance. It not only ignores the spirit, purpose and intent of the constitutional provisions but, as well, their exact wording. The object of construction as applied to a written constitution is to give effect to the intent

of the people in adopting it, and this intent is to be found in the instrument itself unless the words or expressions are ambiguous (Cooley's Constitutional Limitations, 8th Ed., pp. 124-126). There is nothing ambiguous here. The wording of the mandate is broad. Aid or support to the school 'directly or indirectly' is proscribed. The two words must have been used with some definite intent and purpose; otherwise why were they used at all? Aid furnished 'directly' would be that furnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked, and without circumlocution or ambiguity. Aid furnished 'indirectly' clearly embraces any contribution, to whomsoever made, circuitously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interests and purposes. How could the people have expressed their purpose in the fundamental law in more apt, simple and all-embracing language?"

Had the Constitution of New York been like the Constitution of Michigan, a different rule might well have been made.

Under date of February 17, 1936, the Attorney General of Massachusetts rendered an opinion to Hon. Charles G. Miles, Chairman of the Joint Committee on Education, in which he held that a measure requiring school committees to furnish free transportation to schools other than public schools did not violate the provisions of the Constitution, or necessarily forbid the appropriation of public funds for the support and maintenance of a private school. Report of Attorney General of Massachusetts, for year ending November 30, 1936, page 40.

Under date of July 14, 1936, the Attorney General of Iowa rendered an opinion to the County Attorney, Spirit Lake, Iowa, in which he held that the furnishing of transportion to pupils attending a private school was not in violation of a statute providing that "public money shall not be appropriated, given, or loaned by the corporate authorities of any county or township, to or in favor of any institution, school, association, or object which is under ecclesiastical or sectarian management or control." Report of Attorney General of Iowa, 1936, page 512.

In view of the policy of our courts to commit the public schools of the State entirely to the legislature, except as prohibited by the Constitution, and the presumption which exists as to the constitutionality of acts of the legislature, I am of the opinion that the proposed legislation is constitutional.

Very truly yours,

Thomas Read,
Attorney General.

AEK:lh

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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 52

ARCH R. EVERSON,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, *et al.*,

Appellees.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

MOTION OF THE STATE OF NEW YORK FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE

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INDEX

PAGE

Statement 2

Constitutional and Statutory Provisions in New York State 3

Argument 5

POINT I—A state may properly furnish bus transportation of children to schools both public and non-public, and in furnishing such transportation the Fourteenth Amendment is not violated 5

POINT II—More direct contact between the state and the non-public school than transportation of the pupils has been held valid by this Court (*Cochran* v. *Board of Education*, 281 U. S. 370) 9

POINT III—*Judd* v. *Board of Education*, 278 N. Y. 200, was decided under the New York State Constitution prior to the 1938 amendment. This amendment eliminates the ground for that decision 11

Conclusion 12

CASES CITED.

Cochran v. Board of Education, 281 U. S. 370 ...5, 9, 10, 11

Judd v. Board of Education, 278 N. Y. 200 .....5, 11, 12

Peo. *ex rel.* Lewis v. Graves, 245 N. Y. 195 7

Pierce v. Society of Sisters, 268 U. S. 510 6

TEXTS CITED.

"Bus Transportation," (Annual Review and Statistical Number), January 1946 9

Documents of 1894 Constitutional Convention, No. 62 . 12

PAGE

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STATUTES CITED.

New York Constitution
Art. XI, § 4 ..... 3, 8, 11, 12
Art. XVI, § 1 8
New York Education Law
§ 59 8
§ 94 (2) 8
§ 206 (18) 3
§ 503 4
§ 601 8
§ 620 8
§ 621 8
§ 695 8
§§ 705-9 8
§ 720 8
§ 730 8
§§ 735-6 8
New York Tax Law, § 4 (6) 8

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ARCH R. EVERSON,

Appellant,

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Appellees.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

MAY IT PLEASE THE COURT:

The undersigned, as Attorney-General of the State of New York, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

NATHANIEL L. GOLDSTEIN,
Attorney-General of the State of New York,
The Capitol, Albany, N. Y.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No. 52

ARCH R. EVERSON,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, *et al.*,

Appellees.

BRIEF OF THE STATE OF NEW YORK AS AMICUS CURIAE

Statement

The appellant has appealed to this Court pursuant to the provisions of Section 237 (a) of the Judicial Code (28 U. S. C. § 344 [a]), from the New Jersey Court of Errors and Appeals. That Court upheld the constitutionality of Chapter 191 of the Laws of 1941 of the State of New Jersey and the resolution of appellee, Board of Education (133 N. J. L. 350). Appellant attacks the statute and resolution as infringing the Fourteenth Amendment of the Constitution of the United States.

The statute and resolution result in providing free transportation of children at the expense of the home municipality and of the state school fund to and from any school, including a school other than a public school which is not operated for profit.

The New Jersey statutory provision is fully quoted in appellant's brief (pp. 2-3) and, therefore, is not reproduced here. For like reason, further factual details relating to the specific litigation as it arose in New Jersey are not set forth here.

This brief is being filed by the State of New York as *amicus curiae* in accordance with the provisions of Rule 27 (9) of the Rules of this Court, in support of the constitutionality of the challenged statute.

Constitutional and Statutory Provisions in New York State

The Constitution of the State of New York authorizes the Legislature of the State to provide for the transportation of children to and from *any* school. This provision was added to the New York State Constitution in 1938. It was adopted by the New York State Constitutional Convention and approved by vote of the people in that year. It is as follows:

> "Art. XI, § 4. [Use of public property or money in aid of denominational schools prohibited; transportation of children authorized.]
>
> Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, *but the legislature may provide for the transportation of children to and from any school or institution of learning.*" (Provision added in 1938 is emphasized.)

Education Law § 206, subd. 18, accordingly provides:

> "18. Whenever any district shall have contracted with the school authorities of any city, or with another

school district, for the education therein of the pupils residing in such school district, *or whenever in any school district pupils of school age shall reside so remote from the school house therein or the elementary or high school they legally attend,* within or without the district, that they are practically deprived of school advantages during any portion of the school year, the inhabitants of the district entitled to vote are authorized to provide, by tax or otherwise, for the conveyance of pupils residing therein, (a) to the elementary or high schools, or both, maintained in such district and/or (b) to the elementary or high schools, or both, in any city or district which an education contract shall have been made, and/or (c) to the elementary or high schools, or both, other than public, situated within the district or an adjacent district or city.

"The trustee or trustees or board of education of the district may contract with any person, corporation or other school district for such conveyance, when so authorized, in accordance with such rules and regulations as they or it may establish, consistent with rules and regulations of the commissioner of education. The trustees or board when so authorized by vote of the inhabitants of the district entitled to vote, also may purchase and maintain a motor vehicle or vehicles to be used for such conveyance." (Emphasis supplied.)

Education Law § 503 also provides:

"§ 503. Transportation

1. In providing or granting transportation for children pursuant to the provisions of this chapter, *sufficient transportation facilities* (including the operation and maintenance of motor vehicles) *shall be provided for all the children residing within the school district to and from the school they legally attend,* who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children.

2. When the voters, school trustees, or a board of education fail to provide the transportation authorized by this chapter, the parent or guardian of a child or any taxpayer residing in the school district, may

appeal to the commissioner of education, as provided in section eight hundred ninety of this chapter.

* * * * *

4. * * * In defraying any expense incurred in providing transportation of any pupils or children under any provision of this chapter, public moneys apportioned to the district in which such pupils or children reside may be used therefor." (Emphasis supplied.)

Argument

1. A state may properly furnish bus transportation of children to schools both public and non-public, and in furnishing such transportation the Fourteenth Amendment is not violated.
2. More direct contact between the state and the non-public school than transportation of the pupils has been held valid by this Court (*Cochran* v. *Board of Education*, 281 U. S. 370).
3. *Judd* v. *Board of Education*, 278 N. Y. 200, was decided under the New York State Constitution prior to the 1938 amendment. This Amendment eliminates the ground for that decision.

POINT I.

A state may properly furnish bus transportation of children to schools both public and non-public, and in furnishing such transportation the Fourteenth Amendment is not violated.

Broadly speaking, the basis of attack upon the New Jersey statute is that it constitutes the taking of private property for a private purpose, and is, moreover, in aid of sectarian schools, constituting legislation respecting the establishment of religion.

Furnishing transportation to take children to schools is neither the use of public moneys for private purposes, nor does it constitute aid to the establishment of religion.

Compulsory education is one of the basic concepts of the American way of life. It is encouraged and supported by the people. The free American, however, also cherishes his right to have a voice in the education of his child, and to that end, to choose the type of school which his child shall attend. Many prefer the denominational school instead of the public school. Indeed, this Court has held that a state may not pass a law compelling attendance of children at a public school (*Pierce* v. *Society of Sisters*, 268 U. S. 510). There, this Court said (534-35):

> "* * * we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

The sectarian school is thus recognized as legally equivalent to the public school system so far as compulsory attendance is concerned (Encyclopaedia of Social Sciences, Education, Vol. V, p. 422). The children of this country, to the extent of at least ten per cent, attend sectarian schools. It has been said that the same spirit of democracy which nutured public education in this country, has inspired the development of the sectarian school. The elimination of any religious instruction from schools in this democracy has caused parents, who prefer that their children receive instruction of this nature, to maintain the

sectarian school. "The recognition of sectarian education by the state is based ultimately upon its recognition of the primacy of family claims." (Encyclopaedia of Social Sciences, pp. 423-24).

Recognizing the sectarian school as a significant unit in a universal education system, the state cannot divest itself of all connection with it. To do so would be to defeat its own purpose and to exclude from the benefits and from the teachings fundamental in American education those children who do not attend the public schools. The state would be obliged to keep rigidly aloof and have no part in the operation of the sectarian school. Lest this be so, and that education in such schools be comparable to that received in public schools, there must be cooperation between the state and the sectarian schools. Every instance of such cooperation is, to be sure, in a sense "aid" to the denominational school, but every such instance is not forbidden aid. The approach must be realistic. The proper and desirable activities of the state in the interest of education and in the interest of the health and welfare of its children cannot be withheld from some of the children because they attend a denominational school:

> "Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place, outside of public aid or support. * * * The separation of the public school system from religious denominational instruction is thus complete." *(People ex rel. Lewis* v. *Graves,* 245 N. Y. 195, 198-99.)

As education has grown in this country and as government has increased its activities in the interest of the health and welfare of its people and of its children, it has brought within the sphere of its aid and control the denominational as well as the public school.

For example, in the State of New York parochial schools are chartered by the Board of Regents (Education Law § 59). There is regular inspection by the Board of Regents of the non-public as well as the public school (New York State Constitution, Art. XI, § 4; Education Law § 94 [2]). The sectarian school is not subject to taxation (New York State Constitution, Art. XVI, § 1; Tax Law § 4 [6]). Attendance in the non-public school complies with the Compulsory Education Law (Education Law, Art. 23) and satisfies the requirements for part-time attendance (Education Law § 601). Terms of attendance in the non-public as well as the public school are prescribed (Education Law §§ 620-621), and certain curriculum requirements are made (Education Law §§ 620; 695; 705-9; 720; 730; 735-6).

These are all aspects of the inclusion of the denominational school in the universal education program. Some of them have the semblance of aid to the denominational school; others of discipline of the school. If the divorce of the State from the denominational school must be total, the State could not extend the provisions of any of these statutes to it. The principle of separation of church and state must ever remain inviolate in these United States. It has so remained although the several states, under the police power, have legislated in a variety of respects* for the welfare of children in the denominational as well as in the public school. The transportation of pupils by buses to such schools does not spell danger to that principle though philosophically theoretical arguments may be spun showing a benefit to the denominational school to which the child is delivered by bus.

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* "The State and Sectarian Education," National Education Association Research Bulletin, February 1946, pp. 36, 42.

The carrying of children to schools by buses in certain areas throughout the country, particularly the rural and semi-urban, has become almost universal in this automobile age.** The day when the country child trudged miles to school on foot is gone. In this day, when speeding automobiles and trucks race along the way that the child takes to school, to make the way a deathtrap, is the child attending a denominational school to be set on foot on those highways while a child attending the public school is kept safe by the state which is aware that, in the interests of the child's health, welfare and very life, it must carry him to school by bus? Does this act of the state, to preserve its children alive, break down the separation of church and state, because the child it carries enters the denominational school, rather than the public school, when it alights from the bus?

POINT II

More direct contact between the state and the non-public school than transportation of the pupils has been held valid by this Court (Cochran v. Board of Education, 281 U. S. 370).

The *Cochran* case involved a Louisiana statute under which school books were to be supplied to all school children of the state. One of the grounds upon which the statute was attacked was that it violated the Fourteenth Amendment of the Federal Constitution (281 U. S. 370, at p. 373). This Court held that it did not.

** Statistics have been compiled indicating that in 1945, 4,700,000 children in the United States were carried to schools daily in buses. ("Bus Transportation" [Annual Review and Statistical Number] January 1946, p. 69.) See also "Major Developments in the Transportation of Pupils," The American School and University, 1940, p. 551.

The basis of attack, in the words of Chief Justice Hughes, was (p. 374):

> "The contention of the appellant under the Fourteenth Amendment is that taxation for the purchase of school books constituted a taking of private property for a private purpose. *Loan Association* v. *Topeka*, 20 Wall. 655. The purpose is said to be to aid private, religious, sectarian, and other schools not embraced in the public educational system of the State by furnishing text-books free to the children attending such private schools."

Affirming the judgment of the Louisiana Supreme Court which had upheld the statute, Chief Justice Hughes quoted that portion of its opinion which noted that some of the children receiving the books did not attend public schools (281 U. S. at pp. 374-5):

> "'The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.'"

The Chief Justice concluded (281 U. S. at p. 375):

> "Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the State is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

If supplying books to children attending other than public schools is not violative of the Fourteenth Amendment as being aid to such schools, it appears to remove from the realm of argument a contention that the mere transportation of the children to such schools would come within the prohibited taking of private property for a private, as distinguished from the valid public purpose. The relation to the school of the act of transporting the children to it is distinctly more remote than the supplying of books from which the children receive instruction within the very walls of the school. Yet the latter is clearly proper and even imperative if the sectarian school is part of our education system (*supra*, Point I).

POINT III

Judd v. Board of Education, 278 N. Y. 200, was decided under the New York State Constitution prior to the 1938 amendment. This amendment eliminates the ground for that decision.

Prior to November 1938, the specific provision that the "legislature may provide for the transportation of children to and from any school or institution of learning" did not appear in what is now Article XI, Section 4 of the Constitution of the State of New York.

The Court of Appeals in a four to three decision in *Judd v. Board of Education*, 278 N. Y. 200, held under the then existing constitutional provision that free transportation of children to denominational schools was "aid furnished 'indirectly' to such schools" (278 N. Y. 200, 212). The decision reversed the lower courts which had held free transportation permissible even under the constitutional provision as it then was. There was a strong dissenting opin-

ion by Chief Justice Crane in which two other members of the Court concurred.

Now that the permissive provision for bus transportation has been added to the constitutional provision construed in the *Judd* case, and any violation of the New York Constitution is not in question, it is important to note that the Court of Appeals said of the *Cochran* case (278 N. Y. at pp. 213-214):

> "The question of the constitutionality of the act authorizing the appropriation of public funds for the purpose indicated under the Louisiana Constitution was not a Federal question, and the only question involved or decided in the Supreme Court was whether or not the act in question authorized the taking of private property for a private purpose and was thus violative of the provisions of the Fourteenth Amendment to the Federal Constitution."

So rigid is the general provision of the New York Constitution that public property or money may not be used even "indirectly" in aid of denominational schools, that the provision permitting examination or inspection of such schools is specifically set forth as an exception (Art. XI, § 4; Documents of 1894 Constitutional Convention, No. 62). Under the constitutional provision so stringent, bus transportation was held in the *Judd* case to be a form of prohibited "indirect" aid. The further exception was then added in 1938 to the constitutional restriction making provision for such transportation permissible and is in the New York Constitution now.

Conclusion

Bus transportation of children to schools is, in this motor age, a necessary activity by the state to promote the health, safety and welfare of its children. Accordingly, it is not a

use of public moneys for private purposes. It is not use for the benefit of the school which the child attends after it leaves the bus which has carried it, whether such school be the public school or a denominational school.

The constitutionality of the New Jersey statute here challenged should be sustained.

October 17, 1946.

Respectfully submitted,

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Attorney-General of the State of New York.

WENDELL P. BROWN,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 52

ARCH R. EVERSON,
Appellant,
against
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER, ET AL.,
Appellees.

ON APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

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INDEX

PAGE

INTEREST OF AMERICAN CIVIL LIBERTIES UNION 1

STATEMENT OF THE CASE 2

POINT I—The statute and resolution are violative of the Federal constitutional guarantees respecting religious freedom and the fundamental doctrine of separation of church and state inherent therein 4

POINT II—The appropriation through statute or resolution of public funds for transportation of parochial school pupils is in aid and support of such schools and of the religion and religious tenets taught there, and constitutes state support of religion in violation of the said Constitutional provisions 18

POINT III—The decision of this Court in the *Cochran* case should not be considered as controlling in this case 30

CONCLUSION 36

TABLE OF CASES CITED

A., T. & S. F. Rld. Co. *v.* City of Atchison, 47 Kans. 712 27

Adams *v.* St. Mary's County, 180 Md. 550.....21, 24, 34

Bennett *v.* City of La Grange, 153 Ga. 428..... 26

Board of Education *v.* Wheat, 174 Md. 314, 325, 340, 341 .....18, 21, 24, 25, 34

Board of Education *v.* Barnette, 319 U. S. 624, 637, 639, 640, 642, 653-4, 660.....5, 6, 7, 8, 13, 14, 30, 33, 36

Borden *v.* Louisiana State Board of Education, 168 La. Rep. 1005, 1030 22

Bowker *v.* Baker, 167 Pac. 2nd, 256; 73 Ad. Cal. App. Rep. 727 (4th Dist. Ct. of App. Calif.).....21, 24

Bradfield *v.* Roberts, 175 U. S. 291..... 19

PAGE

Cantwell *v.* Connecticut, 310 U. S. 296, 303 ..... 5, 31
Chance *v.* Mississippi, 190 Misc. 453 22
Cochran *v.* Board of Education, 281 U. S. 370 ..... 30, 31
Cochran *v.* Louisiana State Board of Education, 168 La. Rep. 1005, 1030 ..... 22, 23, 30, 31
Connell *v.* Gray, 33 Okla. 591 26
Constitutional Defense League *v.* Waters, 308 Pa. 150 26
Costigan *v.* Hall, 23 N. W. 2nd 495 (Wis. Sup. Ct.) 20
Council of Newark *v.* Bd. of Ed. of Newark, 30 N. J. L. 374 26

Davis *v.* Beason, 133 U. S. 333, 342 8
Douglas *v.* Jeannette, 319 U. S. 157, 162 ..... 5, 32

Gurney *v.* Ferguson, 190 Okla. 254, 256, rehearing denied; cert. den. 317 U. S. 588, 707 ..... 16, 18, 20, 22, 24, 26

Haas *v.* Independent School Dist. No. 1, 9 N. W. 2nd, 707 (S. D. 1943) 26
Hamilton *v.* Regents, 293 U. S. 245, 262, 265 31
Harfst *v.* Hoegen, 349 Mo. 808, 817, rehearing denied 17, 27, 34

Jones *v.* Opelika, 316 U. S. 584, as overruled 319 U. S. 103 32
Judd *v.* Board of Education, 278 N. Y. 200, 210 ..... 15, 19, 22, 23, 24, 26

Knowlton *v.* Baumhover, 182 Iowa 691, 704, 705, 706 ..... 17, 18, 28, 34

Marsh *v.* Ala., 90 U. S. Law. Ed. (Adv. Sheets) 227, 232 31
Minersville School District *v.* Gobitis, 310 U. S. 586, 598 ..... 5, 6, 33
Mitchell *v.* Consolidated School District, 17 Wash. 2nd 61 ..... 20, 24
Murdock *v.* Pennsylvania, 319 U. S. 105, 108, 115, 116, 126 ..... 5, 6, 30, 32

Nichols *v.* Henry, 191 S. W. 2nd, 930 (Ky.) 21, 29

Opinion of the Justices, 214 Mass. 599 26
Otken *v.* Lamkin, 56 Miss. 758 26

PAGE

Palko *v.* Connecticut, 302 U. S. 319, 324 ..... 5, 31
People *v.* Board of Ed. of Brooklyn, 13 Barb. (N. Y. 400) 26
Pierce *v.* Society of Sisters, 268 U. S. 510, 531 ..... 18, 29, 35

Reynolds *v.* United States, 98 U. S. 145, 162-164 12
Rutgers College *v.* Morgan, 70 N. J. L. 460 26

Sherrard *v.* Jefferson County Board of Education, 294 Ky. 469 ..... 21, 22, 29
Smith *v.* Donahue, 202 App. Div. (N. Y.) 656 ..... 18, 22, 26
State of Nev. *v.* Hallock, 16 Nev. 373 26
State ex rel. Traub *v.* Brown, 36 Del. 181, writ of error dismissed, 39 Del. 187 ..... 20, 22
State ex rel. Van Straten *v.* Milquet, 180 Wisc. 109 ..... 20, 24
State ex rel. Public School District *v.* Taylor, 122 Neb. 454 28
Synod of Dakota *v.* State, 2 S. D. 366 ..... 22, 26

Williams *v.* Board of Education, 173 Ky. 708 ..... 17, 26
Wright *v.* School Dist., 151 Kan. 485 28

Statutes Cited

Federal Constitution:
First Amendment 5, 6, 7, 30, 33, 35
Fourteenth Amendment 3, 4, 5, 6, 7, 30, 33

N. J. Constitution:
Art. I, Pars. 3, 4, 19, 20 3
Art. IV, Sec. 7, Par. 6 ..... 3, 4
Dist. Col. Code, 1940, §44-214 27

N. J. Laws of 1941, Rev. Stat. 18:14-8, as amended by Chap. 191 3
60 Stat., 42 U.S.C. §§1751-1760 27
Chap. 268, Publ. 346 (1944), 38 U.S.C. §701 27

Authorities Cited

	PAGE
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141 A. L. R. 1148	28
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

ARCH R. EVERSON,
Appellant,
against
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER, *et al.*,
Appellees.

No. 52.

ON APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Interest of American Civil Liberties Union

This brief is filed with consent of the parties. The American Civil Liberties Union is a nonprofit, nonpartisan organization having a nationwide membership of persons of all religious views and sects including citizens of New Jersey. It is devoted to the preservation and protection of the fundamental liberties guaranteed citizens of this country by Federal and State constitutions. It believes in the historic, basic American doctrine of separation of church and state and that only by its steadfast and

strict observance can the religious freedom of all the people be assured.

We wish it clearly understood that in filing this brief, we do not, expressly or by implication, attack or criticize the principles or practices of any religious organization or disparage parochial or private schools for those whose consciences or preferences prompt them to use such means for the education of their children. We respect the convictions of those who believe it desirable that a school which combines secular and religious instruction is best adapted to the proper development of their children.

What we say here we would repeat with equal emphasis in respect of schools or institutions of any religious denomination or sect.

Our sole concern is with the constitutionality of the appropriation of public moneys for transportation of children to private, sectarian schools.

Statement of the Case

The facts are simple, undisputed. Appellee Board of Education of Ewing Township, New Jersey, in September, 1942, adopted a resolution providing for "transportation of pupils of Ewing to the Trenton and Pennington High and Trenton Catholic Schools by way of public carriers as in recent years". It agreed to pay, for that current school year, the cost of transportation to such Catholic parochial schools. Part of the agreed sum was paid, the balance remaining unpaid because of this suit. Transportation was by public carrier buses. The Board reimbursed Township parents for bus fares, between that township and Trenton, paid by their children attending the four Trenton Catholic parochial schools. These schools, located outside of the Ewing school district, were maintained by

the parish and parents, religion was taught there, and a Catholic priest was school superintendent.

The Board's resolution was based on a New Jersey statute (Rev. Stat. 18:14-8, as amended by Chap. 191, N. J. Laws of 1941) which provides:

> "18:14-8. Whenever in any district there are children living remote from *any* schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, *including the transportation of children to and from school other than a public school, except such school as is operated for profit in whole or in part.*
>
> *When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.*" (Italics ours.)

The amendments of 1941 changed "the schoolhouse" to "any schoolhouse", and added the italicized matter.

On application of appellant, resident and taxpayer of Ewing Township, a writ of certiorari was issued by the New Jersey Supreme Court to review the legality of the resolution. Appellant urged the resolution and statute were illegal as violating various provisions of the New Jersey Constitution (Art. I, Pars. 3, 4, 19, 20, and Art. IV, Sec. 7, Par. 6), and the Fourteenth Amendment of the Federal Constitution.

The New Jersey Supreme Court (one Justice dissenting) set aside the resolution, holding it violated Art. IV,

Sec. 7, Par. 6 of the State Constitution providing that the fund for the support of free schools may be appropriated only to the support of public free schools and not for any other purpose under any pretense (132 N. J. L. 98; R. pp. 34-41).

On appeal, the New Jersey Court of Errors and Appeals reversed and dismissed the writ on the ground the resolution and statute did not contravene the State or Federal Constitutions. Three judges dissented (133 N. J. L. 350; R. pp. 45-62). That Court denied reargument, but allowed this appeal (R. pp. 63, 65).

Appellant assigns as error that the resolution and statute contravene the Fourteenth Amendment in authorizing the gift and use of public funds in aid of private and sectarian schools and the taking of private property for a private purpose or private persons and constitute legislation respecting the establishment of religion and authorizing support of religious tenets by taxation (R. pp. 64-65).

POINT I

The statute and resolution are violative of the Federal constitutional guarantees respecting religious freedom and the fundamental doctrine of separation of church and state inherent therein.

We respectfully submit that the use of public moneys to transport children attending parochial schools is in aid and support of such schools and of religious institutions and tenets, and that the statute and resolution authorizing such expenditures violate the fundamental American principle of separation of church and state and the constitutional prohibition respecting the establishment of religion.

The First Amendment of the Federal Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law". The First is made applicable to the States through the due process clause of the Fourteenth. The fundamental concept of liberty embodied in the Fourteenth Amendment embraces the liberties guaranteed by the First Amendment. The Fourteenth has rendered the states and their agencies as incompetent as Congress to enact laws regarding religion prohibited by the First. (See *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *Douglas* v. *Jeannette*, 319 U. S. 157, 162; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 108; *Board of Education* v. *Barnette*, 319 U. S. 624, 639; *Palko* v. *Connecticut*, 302 U. S. 319, 324.)

Boards of education, as well as States, must observe these constitutional limitations. In the *Barnette* case, *supra*, at page 639, this Court (in overruling *Minersville District* v. *Gobitis*, 310 U. S. 586), said:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. * * *
>
> Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less

> vigilant in calling it to account. . . . There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution."

This Court does not have to become "the school board for the country" to insist that local school boards and school legislation conform to constitutional limitations. No mere issue of "educational policy" is involved here. Moreover this Court will not, in matters of public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed. (Cf. *Gobitis* case, *supra*, at p. 598; *Barnette* case, *supra*, at pp. 637, 640, 642.)

In weighing arguments of the parties here, it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. For the due process test, it is enough for a state to have a "rational basis" for adopting restrictive legislation. But the freedoms of religion, which are in a preferred position, may not be infringed on such slender grounds. While it is the Fourteenth which bears directly upon the States, it is the more specific limiting principles of the First that we believe should finally govern this case. (*Barnette* case, *supra*, at p. 639; *Murdock* case, *supra*, at p. 115.)

In this brief we are dealing with the Fourteenth merely as the transmitting instrument.

As we shall show, the use of public funds to transport sectarian school children is in support of the school and of the religion and religious tenets fostered and taught there. The purpose of the First Amendment, seen in the perspective of history, is clear enough. It was designed to bring about the complete separation of church and state. In the *Barnette* case, *supra* (at p. 655), Mr. Justice Frankfurter referred to this "doctrine of church and state, so cardinal in the history of this nation and for the liberty of our people". This separation was to be achieved by guaranteeing to every person freedom from state interference in his religious beliefs and practices and by preventing the state from lending its aid, support or influence to any religion or religious establishment. No longer were religious institutions to be supported out of the public treasury.

The task of translating the majestic guarantees of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with problems of the twentieth century is not difficult in this case, because the problems of today, involved here, were fully known and experienced in essentially similar manifestations in the eighteenth century and long before, and had led, after a century-and-a-half struggle for religious freedom and the separation of church and state, to the framing and adoption of the First Amendment. The embodiment of these great principles in the new State and Federal constitutions was simply writing colonial experience into the fundamental law of the land. So clearly was this grand purpose etched in history that in 1942 a Justice of this Court

confidently could state (*Barnette* case, *supra*, at pp. 653, 654):

> "The great leaders of the American Revolution *were determined to remove political support from every religious establishment.* • • •
>
> The prohibition against any religious establishment by the government placed denominations on an equal footing—*it assured freedom from support by the government to any mode of worship* and the freedom of individuals to support any mode of worship. • • •
>
> The essence of the religious freedom guaranteed by our Constitution is therefore this: *no religion shall either receive the state's support* or incur its hostility. Religion is outside the sphere of political government." (Italics ours.)

And this Court definitely could state in *Davis* v. *Beason*, 133 U. S. 333, 342:

> "The first amendment to the Constitution, in declaring that *Congress shall make no law respecting the establishment of religion*, or forbidding the free exercise thereof, *was intended* • • • *to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.*" (Italics ours.)

That separation of church and state is a fundamental American principle is manifest from history.

Before the adoption of the Constitution, attempts were made in some colonies and States to legislate not only in respect of the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. For instance, Mary-

land gave its legislature power to "lay a general and equal tax for the support of the Christian religion."; and Massachusetts and New Hampshire empowered their legislatures to raise public moneys "for the support and maintenance of public Protestant teachers of piety, religion and morality". Punishments were prescribed for a failure to attend upon public worship and sometimes for entertaining heretical opinions.

The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia, when we declared our independence. The Episcopal Church had been the established church in that colony. The Presbytery of Hanover, as soon as independence had been declared, and on October 24, 1776, presented a memorial to the general assembly of Virginia asking the abolition of the establishment, which had involved, among other things, the payment of state funds to Episcopal clergy. In their memorial they pointed out what they deemed to be the proper function of government and declared that they were desirous of no state aid in religious affairs. They said "We ask no ecclesiastical establishment for ourselves nor can we approve of them and grant it to others" and they entreated:

> "• • • that all laws now in force in this commonwealth which countenance religious domination may be speedily repealed—that all of every religious sect may be protected in the full exercise of their modes of worship and exempted of all taxes for the support of any church whatsoever, further than what may be agreeable to their own private choice or voluntary obligation."

The Baptists and Quakers joined the Presbyterians in opposing the establishment of the Episcopal church, with

the result that the latter was disestablished. A motion was put before the Assembly, however, to levy a tax for the support of not only the Episcopalian but all denominations. The Presbytery of Hanover, Virginia, again presented a remonstrance in which they stated:

> "As it is contrary to our principles and interest and, as we think, subversive to religious liberty, we do again most earnestly entreat that our Legislature would never extend any assessment for religious purposes to us or to the congregations under our care."

The proposed measure was defeated in 1779, but it appeared again in 1784, when the House of Delegates had under consideration a "bill establishing provision for teachers of the Christian religion." This bill would have allowed every person to pay his money to his own denomination, or if he did not wish to help support any denomination, his money would go to the maintenance of a school in the country. Action on this bill was postponed until the next session to enable the legislature to obtain expressions of opinion on it from the people. This brought out a determined opposition. Thereupon Madison wrote and circulated his famous pamphlet "A Memorial and Remonstrance" in which he demonstrated "that religion, or the duty we owe the Creator" was not within the cognizance of civil government, and made the following statement, which is as applicable today as it was then, however innocent the intrusion of religion into matters pertaining to the State may seem to be:

> "It is proper to take alarm at the first experiment upon our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution.

> The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. *Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease, any particular sect of Christians,* in exclusion of all other sects? that the same authority which can force a citizen to contribute *three pence only* of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" (Italics ours.)

At the next session, the proposed bill was not only defeated, but there was passed in its stead, on December 16, 1785, an "Act for establishing religious freedom" (Statute of Religious Freedom), written by Thomas Jefferson, which is a declaration of religious independence applicable to all situations growing out of a union of state with religion or to any project which would involve such union. The preamble thereto said, among other things:

> "* * * that to compel a man to furnish contributions of money for propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable opportunity of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness * * *."

The statute itself in part provided:

> "That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, * * *."

About a year after the passage of that statute, the convention met which prepared the United States Constitution. Jefferson, away in France, expressed disappointment in a letter that the proposed draft contained no provision for religious freedom. A number of states thereafter proposed amendments, including a declaration of religious freedom. At the first session of the first Congress, the amendment now under consideration was proposed with others by Madison and was adopted. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, took occasion to speak of the First Amendment as "thus building a wall of separation between church and State." (For the foregoing, see *Reynolds* v. *United States*, 98 U. S. 145, 162-164; *"The Legal Status of Church-State Relationships in the United States"*, by Dean Alvin W. Johnson, pp. 90-95 (Univ. Minn. Press, 1934), and authorities there cited; *"Religion in Colonial America"* by William Warren Sweet (1942 Scribner's), especially Chap. X, *"America and Religious Liberty"*, pp. 319-339; *"Jefferson Himself"*, by Bernard Mayo, Houghton Mifflin Co., 1942, pp. 75, 79-84, 86-87. "American Charters, Constitutions and Organic Laws," F. N. Thorpe, Vol. 3, p. 1689, Maryland Constitution of 1776, Art. XXXIII; Vol. 3, pp. 1889-90, Mass. Constitution of 1780, Art. III; Vol. 4, p. 2454, New Hampshire Constitution of 1784, Art. I, Sec. VI.)

A careful examination of the American Federal and State constitutions, in light of the historical background, discloses that nothing is more firmly set forth or more plainly expressed than the determination of their authors to preserve and perpetuate religious liberty and to guard against the slightest approach toward its infringement. They perceived that a union of Church and State, like that

which existed in England and other countries, was certainly opposed to the spirit of our institutions. (See Cooley's *"Constitutional Limitations"*, Vol. II, 8th Ed. (1927), p. 960; Johnson's *"The Legal Status of Church-State Relationships in the United States"*, *supra*, at p. 285.) As pointed out in Cooley's work at pages 966-7, there are certain things which are not lawful under any of the American constitutions, including the following:

> "1. *Any law respecting an establishment of religion.* • • • There is not complete religious liberty where any one sect is favored by the State and given an advantage by law over other sects. Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution; and if based on religious grounds, a religious persecution. The extent of the discrimination is not material to the principle; it is enough that it creates an inequality of right or privilege.
>
> 2. *Compulsory support, by taxation or otherwise, of religious instruction.* Not only is no one denomination to be favored at the expense of the rest, but all support of religious instruction must be entirely voluntary. It is not within the sphere of government to coerce it." (Italics ours.)

In light of our constitutional history, it was not difficult for Mr. Justice Frankfurter, in the *Barnette* case, *supra*, at page 600, to foresee arising in this Court the very issue involved in this case. He said:

> "• • • Children who go to public school enjoy in many states derivative advantages such as free textbooks, free lunch, and free transportation in going to and from school. • • • What of the claim that if the right to send children to privately maintained schools is partly an exercise

> of religious conviction, to render effective this right it should be accompanied by equality of treatment by the state in supplying free textbooks, free lunch, and free transportation to children who go to private schools? *What of the claim that such grants are offensive to the cardinal constitutional doctrine of separation of church and state?*
>
> These questions assume increasing importance in view of the steady growth of parochial schools both in number and in population." (Italics ours.)

The principle of separation of church and state carried over into the field of education. The same spirit that had manifested itself in opposition to state control or support of religion directly likewise bred opposition to state support of sectarian schools. If education was to be religious, it must be carried on by the churches and without the support of the state. With the demand for an educational system supported by the state came a similar demand that such education be nonsectarian. (See Johnson, *"The Legal Status of Church-State Relationships in the United States", supra,* at pp. 15-22, 152.) This principle was recognized by this Court in the *Barnette* case, *supra,* at page 637, where it was stated:

> "* * * Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction."

Courts have been quick to perceive that using public funds to transport or otherwise aid sectarian school children invokes and violates this concept of separation of church and state. Mr. Justice Frankfurter diagnosed the issue in the *Barnette* case, *supra,* at page 660.

In the leading case of *Judd* v. *Board of Education*, 278 N. Y. 200, the New York Court of Appeals, in declaring a statute void and unconstitutional which authorized the use of public funds to pay for the transportation of pupils attending private parochial schools, stated:

> "* * * While a close compact had existed between the Church and State in other governments, the Federal government and each State government from their respective beginnings have followed the new concept whereby the State deprived itself of all control over religion and has refused sectaries any participation in or jurisdiction or control over the civil prerogatives of the State. And so in all civil affairs there has been a complete separation of Church and State jealously guarded and unflinchingly maintained. In conformity with that concept, education in State supported schools must be non-partisan and non-sectarian. This involves no discrimination between individuals or classes. It invades the religious rights of no one. While education is compulsory in this State between certain ages, the State has no desire to and could not if it so wished compel children to attend the free public common schools when their parents desire to send them to parochial schools (*Pierce* v. *Society of Sisters*, 268 U. S. 510), but their attendance upon the parochial school or private school is a matter of choice and the cost thereof not a matter of public concern. As Judge Pound aptly said in *People ex rel. Lewis* v. *Graves* (245 N. Y. 195, 198), 'Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support.' We furnish free common schools suitable for all children of the State regardless of social

status, station in life, race, creed, color or religious faith."

"Any contribution directly or indirectly made in aid of the maintenance and support of any private or sectarian school out of public funds would be a violation of the concept of complete separation of Church and State in civil affairs and of the spirit and mandate of our fundamental law." (Italics author's.)

* * *

"It is claimed that the statute may be sustained as a valid exercise by the Legislature of the police power of the State. This argument overlooks the consideration that even the police power must be exercised in harmony with the restrictions imposed in the fundamental law." (citing cases)

Judd v. *Board of Education,* 278 N. Y. 200, 210, 211, 215.

In the very recent case of *Gurney* v. *Ferguson,* 190 Okla. 254; rehearing denied; cert. den. 317 U. S. 588, 707, the Supreme Court of Oklahoma, in holding invalid and unconstitutional a statute authorizing an expenditure of public moneys to transport pupils to private parochial schools, said in this connection, at page 256:

"The brief for plaintiffs in error emphasizes the wholesomeness of the rule and policy of separation of the church and the state, and the necessity for the churches to continue to be free of any state control, leaving the churches and all their institutions to function and operate under church control exclusively. We agree. In that connection we must not overlook the fact that if the Legislature may directly or indirectly aid or support sectarian or denominational schools with public funds, then it would be a short step forward at another session to increase such aid, and only another short step to some regula-

tion and at least partial control of such schools by successive legislative enactment. From partial control to an effort at complete control might well be the expected development. The first step in any such direction should be promptly halted, and is effectively halted, and is permanently barred by our Constitution."

In *Knowlton* v. *Baumhover*, 182 Iowa 691, at pp. 704, 705, the Court, in restraining school officials from paying out public school funds in aid of a parochial school, stated in an excellent opinion reviewing the authorities:

> "*If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state*, and that our public school system, supported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer, and infidel—shall not be used, directly or indirectly for religious instruction, and above all, that it shall not be made an instrumentality of proselyting influence in favor of any religious organization, sect, creed, or belief.
>
> * * *
>
> * * * To guard against this abuse, most of our states have enacted constitutional and statutory provisions, forbidding * * * all use or appropriation of public funds in support of sectarian institutions." (Italics ours.)

See also the able dissenting opinion in *Board of Education* v. *Wheat*, 174 Md. 314, 325 (a case involving transportation of parochial school children); *Harfst* v. *Hoegen*, 349 Mo. 808, rehearing denied; *Williams* v. *Board of Education*, 173 Ky. 708.

POINT II

The appropriation through statute or resolution of public funds for transportation of parochial school pupils is in aid and support of such schools and of the religion and religious tenets taught there, and constitutes state support of religion in violation of the said Constitutional provisions.

There can be no question that parochial schools generally and Catholic parochial schools in particular are private, religious, sectarian schools and institutions. They are not public schools or part of the public school system. It is recognized that parochial schools are instituted by the Catholic Church so that the youth thereof may receive instruction in its religious principles and beliefs along with secular education. Systematic religious instruction and moral training according to the tenets of that Church are regularly provided. The schools are supported and maintained by the local church parish and diocese. Invariably, the teachers are members of an order. Religious worship, as well as religious instruction, is involved. (See *Smith* v. *Donahue*, 202 App. Div. (N. Y.) 656; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 532; *Board of Education* v. *Wheat, supra; Gurney* v. *Ferguson, supra;* 17 Enc. Brit., page 336: "Parochial Schools".) That secular subjects are also taught there does not change their character. As said in *Knowlton* v. *Baumhover, supra,* at page 706:

> "• • • At the bar of the court, every church or other organization upholding or promoting any form of religion or religious faith or practice is a sect, and to each and all alike is denied the right to use the public schools or the public funds for the advancement of religious or sectarian teaching. To

> constitute a sectarian school or sectarian instruction which may not lawfully be maintained at public expense, it is not necessary to show that the school is wholly devoted to religious or sectarian teaching."

The schools benefited here are four such Catholic parochial schools. As Justice Case (now Chief Justice) said below (R. 62):

> "The operation of a church school under the direction of, and teaching the tenets of, a church, is a primary function whereby that church puts its impress upon and holds the children of the church to its faith. The parochial schools are a part of the ministration of the church under whose control they are. The ministry of the church is concerned and connected therewith. Specifically, in this instance, a priest of the church is the superintendent. The schools are maintained by the parish and by moneys paid by the parents." (133 N. J. L. 350, 367)

Such schools clearly are religious institutions. They are quite different from a private secular hospital corporation which happens to be operated by individuals of a particular religious group (cf. *Bradfield* v. *Roberts*, 175 U. S. 291).

It is equally clear that the furnishing of transportation to children attending private parochial schools out of public moneys is in aid and support of such schools.

The majority, and better-reasoned, view of the courts of this country is that the private and sectarian schools are the beneficiaries of expenditures made out of public funds for the transportation of their pupils. That view is ably and typically expressed in the leading case of *Judd* v. *Board of Education, supra*, 278 N. Y. 200, 211, 212, where the New York Court of Appeals in a similar case stated:

"The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils. That argument is utterly without substance. • • •

Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. 'It helps build up, strengthen and make successful the schools as organizations' (*State ex rel. Traub* v. *Brown*, 36 Del. 181, 187, writ of error dismissed, Feb. 15, 1938). Without pupils there could be no school. It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid."

To the same effect see *Gurney* v. *Ferguson*, 190 Okla. 254, *supra; State ex rel. Traub* v. *Brown*, 36 Del. 181, writ of error dismissed, 39 Del. 187; *Mitchell* v. *Consolidated School District*, 17 Wash. 2nd, 61; *Sherrard* v. *Jefferson County Board of Education*, 294 Ky. 469; *State ex rel. Van Straten* v. *Milquet*, 180 Wisc. 109, which latter case was recently approved in *Costigan* v. *Hall*, 23 N. W. 2nd, 495 (Wisc. Sup. Ct. 1946). See also, Report of Minnesota Attorney General, 1920, page 300, which ruled that "to expend school funds for such purpose (transporting parochial school children in public school buses) would mean, upon a final analysis," • • • "the expenditure of public funds in aid of the support and maintenance of a private school wherein doctrines and creeds of a particular religious sect are promulgated and taught. This the law does not permit." In this connection, Johnson,

in his scholarly work *"The Legal Status of Church-State Relationships in the United States", supra,* states at pages 188-9:

> "The position here taken may be said to be consistent with our general public school policy and the American principles of separation of church and state. It may be difficult for some to see why their children going to a private or parochial school should be denied transportation in the public school bus which passes their doors, and for whose support they are taxed. This denial is, however, the only course that may be rightfully pursued. The matter of transportation is one of the privileges that accompanies attendance at a public school, and it is only as the children are enrolled in the public school that this privilege of transportation facilities may be shared by them. Any other course would directly or indirectly constitute an appropriation of public funds for private or sectarian purposes, and would thus ignore the fundamental purpose of our educational system as set forth in our constitutional and statutory laws."

In several states there has been evolved the theory that such transportation is for the benefit of the child, not the school. (See *Board of Education* v. *Wheat,* 174 Md. 314, *supra* (three Justices dissenting); *Adams* v. *St. Mary's County,* 180 Md. 550; *Bowker* v. *Baker,* 167 Pac. 2nd, 256; 73 Ad. Cal. App. Rep. 727; (4th Dist. Ct. of App. Calif.). In *Nichols* v. *Henry,* 191 S. W. 2nd, 930 (Ky.), the Kentucky Supreme Court expressly reaffirmed its ruling in the *Sherrard* case, *supra,* that public school funds could not be used for the transportation of children attending private schools, but held that a general tax levied for that purpose would be legal.

This "child benefit" theory seems first to have received judicial recognition in *1929* in the "lending text-book" cases of *Borden* v. *Louisiana State Board of Education* and *Cochran* v. *Same*, 168 La. Rep. 1005, 1030, decided simultaneously by a divided court of four to three. That case was followed in *Chance* v. *Mississippi*, 190 Miss. 453, another "lending text-book" case. The able dissenting opinion in the *Borden-Cochran* cases characterized this ruling of the majority as "a mere begging of the question" and as "an attempt to do indirectly that which cannot be done directly". In *Chance* v. *Mississippi*, the dissenting opinion, after citing the authorities and the State and Federal constitutions, including the First Amendment, stated:

> "Both the Federal and the State constitutions sought in unmistakable terms to provide for a complete separation of church and state. * * * The statute involved is a step in the direction of breaking down that separation."

The minority opinion in the *Cochran-Borden* cases was said by the New York Court of Appeals in *Judd* v. *Board of Education, supra,* to be the "better reasoned opinion". In the *Sherrard* and *Gurney* cases, *supra,* the Kentucky and Oklahoma Supreme Courts said that these Louisiana cases and a few others of similar import, were not only contrary to the great weight of authority but "were lacking in persuasive reasoning and logic". In *State ex rel. Traub* v. *Brown, supra,* the Delaware Court, apropos the *Borden-Cochran* decisions, said "We are not impressed by the reasoning of this case. There was a strong dissenting opinion". Compare *Synod of Dakota* v. *State*, 2 S. D. 366, 374, where as early as 1891 a similar argu-

ment (that tuition aided the state or students and not the school) was rejected with this comment:

> "This contention * * * is, we think, unsound, and leads to absurd results. The theory contended for by counsel would, in effect, render nugatory the provisions of the constitution * * * *This theory carried out to its legitimate results, would enable any one leading sect to control the schools, institutions and funds of the state, as it could claim it was rendering services for the funds appropriated. It was undoubtedly to prevent such possible results that these provisions were inserted in the constitution.*" (Italics ours.)

See also, *Smith* v. *Donahue*, 202 App. Div. 656 (N. Y.), approved by the New York Court of Appeals in the *Judd* case, *supra*, for a complete answer to the views of the *Cochran* case majority.

There is much justification for the observation of Justice Case below (R. p. 57) that "It is the consensus of the weight of judicial opinion that the 'child-benefit theory' is an ingenious effort to escape constitutional limitations rather than a sound construction of their content and purpose."

The "child-benefit" theory is not only unsound and devious, but it is extremely dangerous because it provides a ready excuse for all sorts of violations of basic principle. There is no limit or logic to the extent of its application. There is and can be no rational or clear line of demarcation in this field between what constitutes aid to a school as distinguished from aid to a pupil. For example, in the instant case, the provision is for transportation of children by public carrier buses and reimbursement of fares paid to the parents out of public funds. In other

cases legislation, going a step further, has provided for pupils of private sectarian schools to use, at public expense, in conjunction with public school children, the buses owned and operated by a public school district, along or near public school routes, thereby necessitating additional expenditures for more bus routes and buses. (See *Gurney* v. *Ferguson, supra; State ex rel. Van Straten* v. *Milquet, supra; Board of Education* v. *Wheat, supra; Mitchell* v. *Consolidated School District, supra; Bowker* v. *State, supra.*) By still another step, public funds are appropriated in large sums to supply buses *solely* and *especially* for private, parochial school children—with no transportation being provided for public school children in the same county (*Adams* v. *St. Mary's, supra*). It is to be noted that while the *Adams* case was based on the earlier, split *Wheat* decision, the majority in the *Wheat* case had justified its decision on the ground that "*no buses are to be provided for private school children especially.*" Thus it is seen how the process develops from small, indirect aid to direct and large expenditures for the especial and exclusive use of parochial school children, and the *Adams* and *Wheat* cases show how easily the transition can be made and justified once the principle is blurred.

Already, as seen, it has been urged, and occasionally held, in various cases that the use of public funds for transportation, text books and school supplies is justified as in aid of the pupil, not the school. Obviously, the "child-benefit" theory is equally applicable to and may next be urged in support of every proper expenditure for school purposes, such as free lunches, tuition, salaries of teachers, furnishings and equipment, repairs and improvements and even construction of school houses. "Indirect" aid will soon give way to "direct" aid. (See the *Judd*

case, *supra*, at p. 212.) This dangerous trend has been pointed out in various cases and articles. For instance, in the dissenting opinion of *Board of Education* v. *Wheat*, *supra*, at pp. 340, 341, it was said:

> "In a certain sense, the child is a beneficiary, as he is of everything which contributes to his ability to go to school and there to receive an education. However, the existence of the private school is the indispensable prerequisite. Without it, his sectarian education at school cannot be had; nor would any problem of transportation or of accessibility arise. Thus whatever educational benefits are received by the pupil proceed from the school as the primary source to the child. The sectarian school is in competition with the public free school, and cannot maintain its position without sufficient funds. • • • Any apt means for relieving the sectarian school of providing transportation for its pupils at the immemediate charge against public funds is as direct and substantial a donation to the sectarian school, as if the moneys thus appropriated by statute had been paid into the treasury of the school. The device of providing a bus for the common carriage of public and sectarian school children or a bus for their separate carriage cannot affect this conclusion. State *v.* Milquet, 180 Wis. 109, 192 N. W. 392. An appropriation which would be unlawful by direct action may not be lawfully accomplished by indirection. If so, circumvention would attain a new use. There are other purposes and objects more necessary in sectarian schools than the carriage of their pupils, and the theory advanced would permit public funds to be used to pay either for the athletic supplies and equipment of pupils; or for the fuel bill to keep the school room adequately heated; or for the payment of salaries of instructors; or for musical instru-

ments, encyclopedias, laboratory equipment; or for a fund to cover the traveling expenses of the children in their athletic contests. It is submitted that the use of general taxation for these illustrative purposes is neither reasonably nor logically permissible on the theory that the appropriation is not in aid of sectarian schools, but for the benefit of their pupils. * * * Transportation to and from a school is an important factor in securing and keeping pupils. It is obviously an aid."

See also *Gurney* v. *Ferguson, supra.* Dissenting opinion of Justice Case below (R. p. 55); and note in 25 Illinois Law Review 547.

These extensions are not mere far-fetched possibilities. Past experience has indicated their reality. In a number of cases the courts have been asked to uphold appropriations out of the public treasury to sectarian schools and institutions for purposes other than pupil transportation. The use of public funds to pay directly or indirectly the tuition fees of pupils in private or sectarian schools has been sought, but not permitted. See *Otken* v. *Lamkin,* 56 Miss. 758; *Synod of Dakota* v. *State,* 2 S. D. 366, *supra; Williams* v. *Board of Trustees,* 173 Ky. 708, *supra; Rutgers College* v. *Morgan,* 70 N. J. L. 460; Opinion of the Justices, 214 Mass. 599, cf. *Judd* v. *Board of Education,* 278 N. Y. 200, 215, *supra;* so also, for text books and school supplies, *Smith* v. *Donahue, supra, Haas* v. *Independent School District No. 1,* 9 N. W. 2nd, 707 (S. D.); so also, sums of money or financial aid generally, *Council of Newark* v. *Bd. of Ed. of Newark,* 30 N. J. L. 374; *Connell* v. *Gray,* 33 Okla. 591; *State of Nev.* v. *Hallock,* 16 Nev. 373; *Bennett* v. *City of La Grange,* 153 Ga. 428; *Constitutional Defense League* v. *Waters,* 308 Pa. 150; *People* v. *Bd. of Ed. of*

Brooklyn, 13 Barb. (N. Y.) 400; *A., T. & S. F. Rld. Co.* v. *City of Atchison*, 47 Kans. 712.[1]

The extremities to which school boards may go in the direction of breaching the historic wall of separation between church and state is illustrated by *Harfst* v. *Hoegen*, *supra*. There a parish parochial school was taken into the public school system by a local school board, and was thereafter supported by public funds. While the text books and courses of study were prescribed by the state, the children were marched to the church next door for a religious service each day and in school were given sectarian religious instruction. Religious symbols and pictures were in the rooms and the teachers were members of a religious order. In restraining such use of public funds, the Court said that the nominal supervision by the school board was but an indirect means of accomplishing that which the Constitution forbade, and it stated further (at p. 817):

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[1] Appellees' reference to three recent Federal Acts calls for brief comment.

1. The National Free Lunch Act (Act of June 4, 1946, c. 281, 60 Stat. 42 U. S. C. §§1751-1760) authorizes the disbursement of Federal funds through the states or other agencies or (where local laws prohibit this) directly by the Secretary of Agriculture to non-profit private schools (as well as public schools) for lunch room equipment and supplies and for serving lunches free or at reduced cost to pupils. The problems raised by this statute would require careful scrutiny. We do not believe that questions as to its constitutionality need be anticipated by the decision in the case at bar.

2. The District of Columbia Act providing and fixing a reduced fare of three cents for all school children not over eighteen years old on street railway and bus lines to and from schools in the District (Dist. Col. Code, 1940, §§44-214) is in the same category as the Act providing for the free transportation on such lines of policemen and firemen, (*id.* §§44-216). It is merely a matter of rate fixing. No use of or reimbursement out of public funds is involved.

3. The Serviceman's Readjustment Act of 1944 (Chap. 268, Pub. L. 346, 38 U. S. C. §701, Pub. L. 689) is a war measure of limited time duration involving grants to or for the benefit of World War II veterans for vocational and educational aid for their rehabilitation and readjustment in civilian life. More specifically it is for those veterans whose education was impeded, delayed, interrupted or interfered with by reason of entrance into service. Thereunder the veteran is free to enter any educational institution he chooses, public or private, sectarian or non-sectarian. It does not seem to us that this Act violates the First Amendment in respect to religious freedom.

> "Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise. If the management of this school were approved, we might next have some other school gaining control of a school board and have its pastors and teachers introduced to teach its sectarian religion. Our schools would soon become the centers of local political battles which would be dangerous to the peace of society where there must be equal religious rights to all and special religious privileges to none."

Another illustration is in *Knowlton* v. *Baumhover, supra.* There a public school board, in a town peopled largely by Catholic families, sold the public school house as inadequate and rented for public school purposes part of the parochial school house adjoining the church. The instruction given was an admixture of secular and religious teaching. The Court restrained the public school officials from contributing public school funds for the support of this school. See also *Wright* v. *School Dist.*, 151 Kan. 485, where large sums from school taxes were used to supply, equip and maintain a parochial school; *State ex rel. Public School District* v. *Taylor,* 122 Neb. 454; and annotations, 141 A.L.R. 1148 and 5 A.L.R. 879.

In *"The Relation of Religion to Civil Government in the United States"* (Putnam's Sons, 1895), the author, Cornelison, stated at pages 345-346:

> "The fostering of any particular Christian sect, by making appropriations to it from the public treasury, is a wrong so obvious as to need no special consideration. • • •
>
> The public sentiment against making appropriations from the public treasury to any Christian sect upon any pretense whatsoever, whether of promoting

> education or charity, is so widespread and firmly established and the conditions in which such appropriations can be obtained are so unlikely to occur and so repugnant to the feelings of personal independence that no other safeguard is thought to be necessary to prevent the wrong."

The efforts outlined in the cases cited and in statutes recently enacted in some states show that, contrary to the author's expectation that self-restraint would be an adequate safeguard, vigorous application of constitutional principles is necessary to assure continued separation.

By means of the "child benefit" theory, aid to private, sectarian schools out of public funds has been justified by proponents of such aid and by some courts as (1) an incident and in aid of the compulsory education laws,* (2) a valid exercise of the police power in aid of the health, safety and general welfare of the children, including prevention of traffic hazards, (3) a means to give parochial school children the equal rights, benefits and privileges to which it is said they are "entitled". One or more of these theories have been advanced and fully answered in the various school transportation and textbook cases mentioned above. Whether such purposes are stated in the statutes authorizing such aid or are implied by the courts in upholding such aid, they are merely rationalizations and devices to avoid constitutional limitations.

In other cases, such, for example, as this one (R. pp. 50-51) and the Kentucky *Sherrard* and *Nichols* cases, *supra*, such aid is judicially approved by drawing fine distinc-

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* Compare this argument with that made by the appellees in *Pierce* v. *Society of Sisters*, *supra*, where it was urged, and held that state compulsory education laws could not interfere with the right to conduct and send children to sectarian schools.

tions in respect of the source of the public moneys used. These distinctions are without substance. We believe the constitutional principle applies whatever the immediate source of such public moneys. When the Federal and State constitutions were framed, it was well understood that they were intended to prevent *any* aid, direct or indirect, out of the public treasury to sectarian schools. The basic constitutional principle ought not be frittered away by ingenious refinements.

POINT III

The decision of this Court in the *Cochran* case should not be considered as controlling in this case.

Appellee argued below that the decision of this Court in *Cochran* v. *Board of Education*, 281 U. S. 370, disposes of all appellants' assignments of error. The decision therein of the Louisiana Court (168 La. 1005, 1030) has been noted above. That Court was divided four to three. The fallacious reasoning of the majority has been exposed since many times. This Court's decision appears to have been based on the Louisiana Court's interpretation of the state statute.

It does not appear that this Court considered the consequences of applying the test by the First Amendment, transmitted by the Fourteenth, as it must now do under its recent decisions. As Mr. Justice Reed has pointed out in the *Murdock* case, *supra*, (at p. 126), it is only in recent years that the freedoms of the First Amendment have been recognized as among the fundamental personal rights protected by the Fourteenth Amendment

from impairment by the State and until then these liberties were not deemed to be guarded from state action by the federal constitution. Particularly, as to the freedoms of religion, this recognition did not become fully crystallized until 1939 in *Cantwell* v. *Connecticut*, 310 U. S. 296, 303, though it had been suggested in such earlier decisions as *Palko* v. *Connecticut, supra*, at page 324, and *Hamilton* v. *Regents*, 293 U. S. 245, 262. Only recently has the great development of this principle taken place in this Court in a series of far-reaching cases involving religious freedom in various aspects. It is now no longer possible for a state or its agencies to escape Federal constitutional limitations by reliance on construction of state statutes by state courts when they are in derogation of Federal rights now clearly recognized.[2]

In the *Cochran* case, the state court majority held that public moneys appropriated for text books given free to private, sectarian schools were not in aid of such schools, but solely for the benefit of the state or the pupils. That such schools were thus relieved of the expense of supplying their own text books and were supported by public funds to that extent and that this was merely a method of doing indirectly what could not be done directly—using public funds to aid private sectarian institutions—was entirely disregarded and this Court felt constrained to accept the state court's construction. Furthermore, the Louisiana majority justified its conclusions on the ground that the books were merely lent, not given, to the pupils and there was no segregation of the beneficiaries. It certainly cannot be claimed here that bus rides or public money paid therefor are "lent" to the sectarian school

[2] Where as here a decision of a state court involves a local matter as well as constitutional rights, a state court decision of a local question cannot control the Federal constitutional right. *Marsh* v. *Ala.*, 90 U. S. Law. Ed. (Adv. Sheets) 227, 233.

or pupils or that this School Board resolution did not segregate the beneficiaries of the aid. Accordingly we suggest that the *Cochran* case should not be regarded as controlling here.

State legislatures and school boards can devise many indirect ways and means of aiding private, sectarian schools and institutions with public moneys, particularly in communities which are predominantly of a particular sect, if they are but slightly encouraged and given an opening wedge.* Such invasions of fundamental freedoms are never made all at once or by frontal attack, but are gradual and indirect. However seemingly innocent and minor they may appear to be, this Court must be vigilant in striking them down. Such has been the Court's policy.

This Court recently has held that neither a state nor a municipality thereof, under these constitutional limitations, may impose a tax on the exercise of a religious venture designed to propagate the beliefs of a particular sect and to deprecate the beliefs of more established faiths. It said that a community may not suppress, or the state tax, the dissemination of views because they are unpopular or distasteful, and such a device would be a ready instrument for the suppression of an unpopular faith which some minority cherishes and would be a complete repudiation of the philosophy of the Bill of Rights. See *Murdock* v. *Pennsylvania, supra,* at page 116; *Jones* v. *Opelika,* 316 U. S. 584, as overruled 319 U. S. 103; *Douglas* v. *Jeannette, supra.* If a state may not levy a tax on a religious propagation venture, it logically follows that it cannot constitutionally tax the people generally and use part of such taxes to sup-

* Since the *Cochran* case decision (1930) and apparently in reliance thereon, several states have enacted legislation designed to provide text books free to private sectarian schools and several more states have passed laws authorizing the use of public funds for transporting private, sectarian school pupils.

port a venture designed to teach and propagate the beliefs and practices of a religious sect. Such a device can be made a ready instrument to aid and support propagation of particular religious beliefs, through sectarian schools well and favorably established in a local community.

This Court has held that students in public schools cannot be compelled by boards of education to participate in a civil patriotic ceremony which happens to conflict with their particular religious faith. *Gobitis* case, *supra*, as overruled by *Barnette* case, *supra*, at page 642. It follows that public financial support in aid of sectarian schools teaching that or some other religious belief is not constitutional as in violation of the principles of religious freedom embodied in the First and Fourteenth Amendments.

It has been argued that use of public funds for sectaries is justifiable because all citizens are taxed for the support of public schools. However, any parents can send their children to public schools and none can be compelled to send them there rather than to a sectarian school. The choice is free. Only a weighing of values and desired advantages is involved. Sectarian religion need not be taught in school. It can be taught and practiced freely in churches and homes. Many sincerely religious parents prefer to have their children attend the secular public schools while others see advantages in having children go to private or religious schools. Other apparent inequalities can be suggested. Childless parents are taxed to support public schools. Quakers are compelled to pay taxes for the support of a government that carries on war and administers oaths contrary to their religious beliefs. Christian Scientists are taxed to support many governmental sponsored and financed medical practices, contrary to their religious beliefs. These

are merely some of the unavoidable inequalities of treatment that necessarily occur in the maintenance of popular, democratic government; they do not suggest that the historic separation of Church and State should be abandoned.

Conclusion

This case is important and timely. It presents a situation which, however innocent or plausible it may be made to appear, constitutes a definite crack in the wall of separation between church and state. Such cracks have a tendency to widen beyond repair unless promptly sealed up.

The case arises in the field of sectarian religion where it is difficult to maintain an attitude of calm and detachment. Many decisions in the field have been decided by divided state courts. This difficulty is intensified in states and communities where particular sectarian schools are widely patronized and established. Cf. the *Adams, Wheat, Knowlton* and *Harfst* cases, *supra*. Political pressures and religious feeling and intolerance often make it difficult for local officials to act according to the philosophy of the Bill of Rights. But these difficulties were even more acute in colonial times. The ideals of religious freedom and separation of church from state which permeate our constitutions and institutions were achieved in this country only after a 150 years struggle and after what Jefferson characterized as the "severest contests in which I have ever been engaged." (Jefferson Autobiography, Vol. I, pp. 53-59.)

To deny governmental or public financial support to sectarian institutions is not to deny the efficacy of religion or religious instruction. The church and the home are free to teach religion. Recent decisions have placed religious

exercises beyond state interference. The faiths that deserve to survive will survive without state support. It has been recognized by this Court that parochial education has been "long regarded as useful and meritorious." (*Pierce v. Society of Sisters*, 268 U. S. 510, 534.) The same can be said of such education whether it is given in Catholic, Quaker, Presbyterian, Congregational, Methodist, or other sectarian schools. The problem here is merely to keep the separation clear, to avoid public support for religions so that the State may neither subsidize nor control an area wholly beyond its competency.

The constitutional policy of our country has decreed the absolute separation of church and state, not only in governmental matters but in educational ones as well. Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise. The Virginia Statute of Religious Freedom referred to such a practice as "sinful and tyrannical". The First Amendment was designed in part to prevent this very practice which had obtained in several of the colonies. Passage of time has not weakened but rather has emphasized the importance of preserving the constitutional barriers.

This Court aptly said in the *Barnette* case, "The first amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."

We respectfully submit that the resolution and statute in question are plainly unconstitutional.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 52

ARCH R. EVERSON,
Appellant,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL.,
Appellees.

ON APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* ON PETITION FOR REHEARING

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

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The American Civil Liberties Union, for reasons stated therein, filed a brief *amicus curiae* upon the merits.

The issues in this case are so grave, the doubts raised by the opinion of the Court are pregnant with such conflicts, that we respectfully urge reargument and reconsideration. The opinion indicates that the action of New Jersey which it sustained "approaches the verge" of Constitutional power but where the brink may be, is left

obscure. While it emphasizes the compelling nature of the prohibitions in the First Amendment and declares the Court's determination to avoid "the slightest breach" in the wall separating church and state, what will now be considered a breach is left in doubt. The legislation under review is apparently regarded as close to a breach but is held not to be one. In sustaining the legislation as for the "public welfare," no limitations upon the use of that justification for what would otherwise transcend Constitutional power, are clearly prescribed.

In view of the past controversies reflected in state court decisions, the existence of related legislation in various states, the support mustered on behalf of such legislation in this Court and comments in the press following the decision, it may safely be predicted that there will now occur an intensive drive in many communities to pass new legislation on the authority of the Court's opinion and to extend existing legislation to the utmost limits, which it may be argued the opinion sanctions.

There is no reason to doubt that, encouraged by the use of broad reference to "public welfare" legislation, these efforts will go far beyond bus transportation and will include, among other things, attempts to provide, at public expense, such other essential facilities as books, lunches, salaries, school buildings, etc. The opinion certainly does not contain clear warnings as to the limits of the "public welfare" justification. While there are a myriad of questions which need consideration, two groups of questions may be mentioned as of special importance:

(1) Upon the record before the Court it is clear that the legislation, as interpreted by the local action, which the Court upholds, provided for reimbursement to parents

of children attending only public schools and certain schools maintained by the Catholic church. If such selective legislation is now to be regarded as "public welfare" legislation, it would be desirable for the Court to delineate the precise nature of permissible discrimination.

(2) Clarification of the concept in its context is needed also to enable local authorities to distinguish between action which will be regarded as valid "public welfare" legislation and that which will be regarded as invalid support to religious institutions. For example, may or must local authorities now provide at public expense facilities in denominational schools equivalent to those provided in public schools, such as free supplies, meals, tuitions, etc.? Must the public maintain private and secular school houses and standards of instruction equivalent to those in public schools? If all of the approximately 250 sects in the United States should now choose to maintain denominational schools, would the Court's decision apply equally to them? The questions which readily occur are numerous and fundamental.

The efforts which experience shows will undoubtedly follow the Court's decision will not only involve, as we believe, further serious breaches in the wall erected by the Constitution, but also the sort of unseemly contest among religious sects for public support which the First Amendment was intended to prevent by forbidding all the support. (See Madison's Memorial and Remonstance, Par. 11.) Thus a construction of the First Amendment exempting "public welfare" legislation may be readily turned into an instrument disruptive of the "domestic tranquility" and "general welfare" for which the Preamble shows the Constitution itself was established.

The issues here are so grave, the doubts so many, that the matter should not be left merely to future consideration in other cases. The consequences of the storms which may be loosed in local communities by this decision, at least unless it is clarified, may not lend themselves readily to mere subsequent adjudication. The cracks in the wall will be easier to avoid now than when great shoring-up operations may be needed. This Court has frequently recognized, in recent years, the propriety of early reconsideration of great issues involving religious freedom and none of these recent cases involved issues more important than those here.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

KENNETH W. GREENAWALT,
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Of the New York Bar,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1946. No. 52

ARCH R. EVERSON,

Appellant,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING ET AL.,

Appellees.

BRIEF *AMICI CURIAE* OF NATIONAL COUNCIL OF CATHOLIC MEN and NATIONAL COUNCIL OF CATHOLIC WOMEN

JAMES N. VAUGHAN,
JEREMIAH P. LYONS,
GEORGE E. FLOOD,
EUGENE J. BUTLER,
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Attorneys.

INDEX

PAGE

Statement of Interest 1

Facts 2

The Question 3

Summary of Argument 3

POINT I—The purpose of the law is a public purpose from a tax standpoint and is in no sense condemned by the rule of Loan Association v. Topeka, 20 Wall. 655 5

POINT II—With regard to the Federal Constitution the policy of a State toward schools within its borders reflects merely a design of history and does not spring from inherent constitutional necessity 9

POINT III—Non-profit private schools including such schools as are conducted under denominational auspices fulfill a public function in every State of the Union. Aid to them if given by the State on a non-discriminatory basis as part of its educational policy is not offensive to the Fourteenth Amendment to the Federal Constitution 14

POINT IV—Laws granting public incidental aid on a non-discriminatory basis to non-profit private schools including such schools as are conducted under denominational auspices are not laws "respecting an establishment of religion" 21

POINT V—The "wall of separation" between Church and State is not undermined, breached or cracked by this Transportation Law. Abandoning metaphor, if this law be deemed to aid parochial schools it nevertheless does not offend the First

PAGE

Amendment because that amendment though negativing a State Church and coercive activity directed against conscience does not deny to the Forty-eight states power to serve their own legitimate educational interests in their citizens as citizens 32

Point VI—Conclusion 40

Appendix 42

Table of Cases

Arver v. U. S., 245 U. S. 366 27

Barbier v. Connolly, 113 U. S. 27 5
Bissel v. Davison, 65 Conn. 183 9
Bradfield v. Roberts, 175 U. S. 291 ..... 24, 27

Chance v. Mississippi Textbook Rating and Purchasing Board, 190 Miss. 453 ..... 23, 35
Cochran v. Louisiana State Board of Education, 281 U. S. 370 7
Cole v. LaGrange, 113 U. S. 1 6
Curtis's Adm'r. v. Whipple and others, 24 Wis. 350 .. 7

Dallas v. Fosdick, 40 How. Pr. (New York) 249 9
Douglas v. Jeannette, 319 U. S. 157, 162 30

Farrington v. Tokushige, 273 U. S. 284 20

Gong Lum v. Rice, 275 U. S. 78 ..... 9, 11, 12

Hall v. DeCuir, 95 U. S. 485 9

Jenkins v. Andover, 103 Mass. 94 7

Loan Association v. Topeka, 20 Wall. 655 ..... 3, 5, 6, 8

Meyer v. Nebraska, 262 U. S. 390 20
Murdock v. Pennsylvania, 319 U. S. 105 ..... 25, 30

People ex rel. Cisco v. School District, 161 N. Y. 598 ..... 9, 10

PAGE

People v. Easton, 13 Abb. Pr. N. S. (New York) 159 .. 9
People ex rel. King v. Gallagher, 93 N. Y. 438 9
Pierce v. Society of Sisters, 268 U. S. 510 .....16, 17, 18, 20, 30, 38
Prince v. Massachusetts, 321 U. S. 158 .....14, 18, 20

Quick Bear v. Leupp, 210 U. S. 50 .....20, 24

Terrett v. Taylor, 13 U. S. 43, 49 29
Thomas v. Collins, 323 U. S. 516 .....21, 22, 30

Matter of Walters, 84 Hun (New York) 457 9
Watson v. Jones, 80 U. S. 679, 728 30
Waugh v. Mississippi University, 237 U. S. 589 11
West Virginia State Board of Education v. Barnette, 319 U. S. 624 .....9, 12, 16, 21, 27
Western Turf Association v. Greenberg, 204 U. S. 359.. 7

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Musmanno: Proposed Amendments to the Constitution 11

Report of President's Advisory Committee on Education, February 1938 31

Tiffany, Joel: On Government and Constitutional Law 29

TABLE OF STATUTES

Section 18:14-8 of the Revised Statutes of New Jersey as amended by Chapter 191 of the Laws of 1941.. 42

IN THE

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OCTOBER TERM 1946. No. 52

ARCH R. EVERSON,

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BOARD OF EDUCATION OF THE TOWNSHIP OF EWING ET AL.,

Appellees.

BRIEF *AMICI CURIAE* OF NATIONAL COUNCIL OF CATHOLIC MEN and NATIONAL COUNCIL OF CATHOLIC WOMEN

Statement of Interest

This brief is filed with the consent of both parties.

The National Council of Catholic Men and the National Council of Catholic Women are nonprofit organizations incorporated under the laws of the District of Columbia. These national organizations are federations of Catholic associations of men and women.

Many Catholic parents are directly affected by the present controversy since they were joined as defendants in the action.

Moreover, if the attack on the New Jersey statute should be successful, the consequences would be a hardship imposed upon children who attend parochial schools in many States and upon their parents who are compelled by law to get their children to school or to suffer penal consequences.

It is, therefore, in the broad interests of parental and child welfare in many regions in the United States, particularly in rural regions, that the National Council of Catholic Men and the National Council of Catholic Women submit this brief.

Facts

Prior to 1941 the State of New Jersey by Section 18:14-8 of its Revised Statutes provided transportation for school children living remote from the public schoolhouses of their attendance. By Chapter 191, Laws of 1941, this Statute was amended to include among the school children so to be transported children attending non-profit schools other than public schools.

On the authority of this law the Board of Education of the Township of Ewing, County of Mercer, adopted a resolution providing transportation of its school children for the year 1942-1943. In conformity with the resolution $357.74 was spent to defray transportation costs of twenty-one pupils from the Township attending non-profit parochial schools in Trenton, New Jersey.

Everson, a taxpayer of Ewing, sued to set aside the resolution. Substantially his claim was that the underlying statute offended the Constitution of the State of New Jersey and the Constitution of the United States. The highest court of the State of New Jersey sustained the law. That Court, construing the act, held (1) that the transportation of school children attending non-profit private schools was authorized as incidental to the trans-

portation of public school children similarly situated; and (2) that the Legislation amounted to an integral element in the State policy of compulsory education and dealt with a public matter specifically because it was in aid of parents obliged by law to cause their children to attend school; parents who, but for such free transportation, would often be unable to satisfy the requirements of the compulsory education statutes.

Of course compulsory education statutes do not operate solely on parents choosing public schools for their children.

The Question

The sole question presented by this appeal is whether the Act as thus construed by the highest court of the State of New Jersey must fall by reason of the Fourteenth Amendment to the Federal Constitution viewed either in its primary text or in its meaning after absorption of the First Amendment.

Summary of Argument

I.

The purpose of the law is a public purpose from a tax standpoint and is in no sense condemned by the rule of *Loan Association* v. *Topeka*, 20 Wall. 655.

II.

With regard to the Federal Constitution the policy of a State toward schools within its borders reflects merely a design of history and does not spring from inherent constitutional necessity.

III.

Non-profit private schools including such schools as are conducted under denominational auspices fulfill a public function in every State of the Union. Aid to them if given on a non-discriminatory basis by the State as part of its educational policy is not offensive to the Fourteenth Amendment to the Federal Constitution.

IV.

Laws granting public incidental aid on a non-discriminatory basis to non-profit private schools including such schools as are conducted under denominational auspices are not laws "respecting an establishment of religion."

V.

The "Wall of Separation" between Church and State is not undermined, breached or cracked by this Transportation Law. Abandoning metaphor, if this law be deemed to aid parochial schools it nevertheless does not offend the First Amendment because that amendment though negativing a State Church and coercive activity directed against conscience does not deny to the forty-eight States power to serve their own legitimate educational interests in their citizens as citizens.

VI.

Conclusion

POINT I

The purpose of the law is a public purpose from a tax standpoint and is in no sense condemned by the rule of *Loan Association* v. *Topeka*, 20 Wall. 655.

Prior to 1941 public money was appropriated by New Jersey for free transportation of public school children living remote from their schoolhouses. The State evidently had the right to appropriate public money for that purpose. Nobody in this litigation questions that right. The effect of the 1941 amendment was to expand the class of direct beneficiaries of such free transportation. In contrast with the original text the amended text of the law makes no distinction between parents sending their children to non-profit private schools and parents sending their children to public schools. As all parents are subject to the same penal statutes respecting compulsory education, so all parents are made eligible for help in obeying these statutes.

The expansion of the Law in 1941 seems to meet the requirements stated by Mr. Justice Field that the Fourteenth Amendment "* * * undoubtedly intended * * * that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness * * * that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, * * *" (*Barbier* v. *Connolly*, 113 U. S. 27, 31).

Every parent has the right to choose the school his child shall attend. However, he must choose some school. And if he neglects to do so, the State, as *parens patriae*, will (save in a few immaterial and exceptional cases) compel him to choose a school and send his child to it; other-

wise the State will impose the statutory penalities. When the choice of a school has been made, if it is a public purpose to aid by free transportation parents who have selected public schools for their children, it is no less a public purpose to aid parents who have selected non-profit private schools.

Concededly when the State appropriates public money commercially to subsidize a private person or business its action is an abuse of the taxing power; clearly this is deprivation of property without due process of law. The principle in question is too well established to require extensive citation to authority. It was early formulated in *Loan Association* v. *Topeka* (20 Wall. 655). 'The holding of that case was briefly indicated by this Court in *Cole* v. *LaGrange*, 113 U. S. 1, 6, where the Court said:

> "In Loan Association v. Topeka, 20 Wall. 655, bonds of a city, issued, as appeared on their face, pursuant to an act of the legislature of Kansas to a manufacturing corporation, to aid it in establishing shops in the city for the manufacture of iron bridges, were held by this Court to be void, even in the hands of a purchaser in good faith and for value."

The purpose, scope and effect of the present law are wholly different from the purpose, scope and effect of private purpose legislation. If one keeps to the authoritative construction of the challenged statute—the construction given the law by the highest court of New Jersey—this legislation is seen to be essentially an exercise by the State of its police power and incidentally an exercise of its taxing power. Either power may be exerted "* * * not only for the public health, the public morals and the public safety, but for the general or common good, for the well being, comfort and good order of the people. The enactments of a State, when exerting its power for such purposes, must be respected by this Court, if they do not violate rights granted or secured

by the Supreme Law of the land" (*Western Turf Association* v. *Greenberg*, 204 U. S. 359, 363). Is it reasonable to hold unconstitutional a statute intended to aid parents to fulfill the requirements of a penal statute? If it is, then all such free transportation of school children is unconstitutional regardless of the schools they attend.

The presentation in this cause of the claim that public money is here appropriated to private purposes seems to arise from a transposition of the adjective "private" from its place as a qualifier of "schools" to an unsuitable position as a qualifier of "purposes". The word "private" is merely descriptive of schools other than public schools. However, the purpose of the private school, no less than that of the public school, is a public purpose, namely education. In this respect the present case is within the rule of *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370.

To qualify for the aid the schools must be non-profit organizations. They do not profit from the supposed assistance except in the measure that in all public expenditures the money spent necessarily comes to some private hand. Does the Federal Constitution render the State powerless to aid private institutions fulfilling public purposes? If it does, then aid to private hospitals, orphanages and the like must be struck down. But this conclusion is palpably absurd.

Not even the very old State cases of *Jenkins* v. *Andover*, 103 Mass. 94, and *Curtis's Adm'r.* v. *Whipple and others*, 24 Wis. 350, both of which were decided in 1869, would support such view. Each of these cases dealt with the propriety of direct application of tax money in aid of a single and wholly private school. In the Massachusetts case $25,000 in public money had been appropriated to rebuild a school destroyed by fire. The school had been built originally by means of money derived from a bequest

under a Will. The appropriation of public money for the purpose described was denied validity because the Constitution of the Commonwealth of Massachusetts expressly prohibited raising money by taxation for any school other than the common schools of that Commonwealth.

The Wisconsin case seems to be of like effect. Moreover the Court was careful to point out that no direct public benefit could be found in the case before it. The Court however noted (p. 355) that:

> "Any direct public benefit or interest of this nature (i. e. subserving the peace, good order or welfare of society), no matter how slight, as distinguished from those public benefits or interests incidentally arising from the employment or business of private individuals, or corporations, will undoubtedly sustain a tax."

In the Massachusetts and Wisconsin cases the schools involved were held in point of fact to be enterprises no less private than the manufacturing establishment whose intended benefit from taxation was considered to be unconstitutional in *Loan Association* v. *Topeka*.

In the present instance, however, if non-profit private schools as a class are to be deemed incidentally benefited by the bus law it should be observed that their private quality exists only in a highly restricted sense. Such schools are subject at many turns to State control. They also make possible parental compliance with compulsory attendance laws. In point of fact such schools today are an integral element in the complete American system for educating the masses of American children—a fact to be made more apparent by discussion hereinafter (cf. *infra* Point III).

POINT II

With regard to the Federal Constitution the policy of a State toward schools within its borders reflects merely a design of history and does not spring from inherent constitutional necessity.

There runs through the thinking of Appellant, tacitly perhaps, but as a fundamental principle, the belief that public schools as now existing in the State of New Jersey and elsewhere somehow exist by inherent constitutional necessity. This is an erroneous idea.

It was long ago established and is not now open to question (if we are to act in continuity with our national past) that no person as against the State has an inalienable right to an education. The State therefore is not required by any principle inherent in Government to take measures systematically to provide education for its children. In short the very existence of public education is simply an adventitious historical occurrence. It springs from a free choice made by the people of the various States. It is the creature of positive law. *Gong Lum* v. *Rice*, 275 U. S. 78; *Hall* v. *DeCuir*, 95 U. S. 485, 504; *People* v. *Easton*, 13 Abb. Pr. N. S. (New York) 159; *People ex rel. Cisco* v. *School District*, 161 N. Y. 598; *People ex rel. King* v. *Gallagher*, 93 N. Y. 438; *Dallas* v. *Fosdick*, 40 How. Pr. (New York) 249; *Matter of Walters*, 84 Hun 457; *Bissel* v. *Davison*, 65 Conn. 183. The cited cases clearly show not only that the existence of the system is a matter of State discretion but also that the system itself, once it exists, may be regulated as each State sees fit subject to rights secured by the Bill of Rights; rights recently illustrated by *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624.

As was stated in *Dallas* v. *Fosdick* (*supra*) at page 251:

> "The right to be educated in the common schools of the state, is one derived entirely from the legisla-

tion of the state; and as such, it has at all times been subject to such restrictions and qualifications as the legislature have from time to time deemed it proper to impose upon its enjoyment."

This Court further noted that (p. 253):

"* * * the right which it (the law) secured was derived from and conferred by the law, and it was liable to be modified and changed by the same authority that had made the law. And since *the power of the legislature over the subject was complete and ample, it could in the exercise of that power, either repeal the law, and thereby defeat the right altogether, or change and qualify it* * * *." (Italics supplied.)

It is common practice in the public school system of today to segregate the children in accordance with age, sex, ability and color. So long as segregation does not defeat the demand that no person and no class shall be denied equal protection of the laws and so long as other rights secured by the Bill of Rights are not violated, the particular State, actuated by considerations of public welfare, may use any principle of classification, segregation and curriculum making it may choose. Speaking of the system in New York, the highest Court there in *People ex rel. Cisco* v. *School Board* (*supra*) states (p. 602) that there is nothing in the Constitution of New York State

"* * * which prevented the Legislature from exercising its discretion as to the best method of educating the different classes of children in the state, whether it relates to separate classes as determined *by nationality, color or ability, so long as it provides for all alike* in the character and extent of the education which it furnished and the facilities for its acquirement." (Italics supplied.)

In *Gong Lum* v. *Rice* (*supra*) the Court speaking by Chief Justice Taft said (p. 85):

> "The right and power of the State to regulate the method of providing for the education of its youth at public expense is clear."

See also *Waugh* v. *Mississippi University*, 237 U. S. 589.

The view that the existence and the form of systems of public education are matters left wholly to the discretion of the individual State gains confirmation from the attempt nine times made up to 1929 to get an amendment to the Federal Constitution requiring all States to establish and maintain systems of public schools for all children between ages 6 to 16 (See Musmanno: Proposed Amendments to the Constitution, p. 182; House Document 551, 70th Congress, 2nd Session).

Before the public school system of education was inaugurated there had already grown up likewise as a matter of historical choice an older body of non-profit private schools many of which were under denominational auspices. Both groups of schools provide substantially the same course of study. Non-profit private schools under denominational auspices also include in their curricula formal religious instruction.

These latter schools do indeed enjoy the measure of autonomy that is due them by reason of their origin from a source (*i. e.*, parental rights) independent of State legislation. However, they acknowledge a responsibility to the State inasmuch as they train its citizens, and they do not claim to be inaccessible to the power of the State in so far as the regulation of schools is integral to the protection of the public welfare. For example, truancy laws apply with equal obligation to private school pupils as to public school pupils.* And truancy on the part of private

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* The extent and variability of State control and supervision of non-profit private schools are indicated by Table 2 printed at page 42 of 24 National Education Association Research Bulletin (No. 1) February 1946.

school pupils is not excused simply because the administrators of such schools might excuse it. Again private school children may not be indoctrinated with ideas or trained in practices inimical to the public welfare, nor may their instruction fall below certain minimal standards. The interest of the State in such schools is present strongly enough to protect the children from deviation in any of these respects, for in so protecting its children the State protects itself.

The educational scene as it exists factually comes to this: Answering to varied needs experienced and various rights enjoyed in American society both public and non-profit private schools emerged in significant numbers in the first half of the Nineteenth Century and both exist in strength today. Historical choice created and fashioned them in the forms in which we now know them. Today they stand side by side fulfilling public need.

If one seeks for a guide to the meaning of the Federal Constitution as it bears on State legislation affecting the two groups of schools it will be found in the fact that in neither type of school may any practice be permitted which infringes constitutional rights secured to the people by the Federal Constitution (*West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; *Gong Lum* v. *Rice*, 275 U. S. 78, 85). With these rights secured, however, the Federal Constitution has no concern with what the State chooses to do in carrying to fruition its broad public interest in education.

During the war it was notable that in training nurses in hospitals and military men in schools Congress did not discriminate between public and private hospitals or between public and private schools. The action Congress took in making provision for such training was based on a realistic appreciation of our national resources. Congress realized that some hospitals were public and others private and that some of the latter were under religious

auspices. It noted comparable facts with regard to schools. It then utilized all resources with evenhanded and grateful impartiality in its national program for rapid development of the indispensable skills of which this nation stood in urgent need. The circumstance that a hospital or a school was found to be under denominational auspices was deemed immaterial. That circumstance did not deprive the hospital of the character of hospital or the school of the character of school.

It is to be doubted that this Congressional action was unconstitutional. If it was not unconstitutional what Federal reason would suggest itself to nullify decision of a State to bring within the scope of its active interest non-profit private schools as well as public schools and use both types of schools as equally legitimate means for achieving its educational aims?

The presence or absence of religious instruction in non-profit private schools could well appear in the eyes of the State as an immaterial element in relation to the State's aim. Likewise immaterial is the private or public character of "control" of such schools, provided always, that such control does not (and it does not) imply withdrawal of the schools from the range of regulation necessary to assure proper compliance with the over-all program of compulsory education or proper application of any aid to the schools the State might determine to supply.

POINT III

Non-profit private schools including such schools as are conducted under denominational auspices fulfill a public function in every State of the Union. Aid to them if given by the State on a non-discriminatory basis as part of its educational policy is not offensive to the Fourteenth Amendment to the Federal Constitution.

For the sake of the argument let it be assumed that the New Jersey bus law gives aid incidentally to the non-profit private schools although in point of fact it is established by the Court of New Jersey that this assumption is unsound.

The State has sovereign power to watch over the welfare of all persons under disability especially where the disability arises from infancy. This is axiomatic. The State exercises this sovereign power extensively and continuously. Because this power as exerted in favor of minors guards them against crippling dangers from which maturity is the only substitutionary protection, Courts rarely interfere with its exercise. How far State activity may go in legislating for the protection of minors is illustrated by the recent decision of *Prince* v. *Massachusetts*, 321 U. S. 158. The Court there said that while it is serious enough when the State enters into conflict with a parent over control of a child when only secular matters are concerned the situation becomes still more serious when an element of religious conviction is present. The court fully appreciated the strength of the parent's protest against State control of his child when this protest was based on an appeal both to his parental rights and to his rights of conscience; nevertheless the Court sustained the controlling arm of the State as against the parental protest. It stated that "A democratic society rests, for its continuance, upon the healthy, well rounded growth of young people into full maturity as citizens, with

all that implies. It may secure them against impeding restraints and dangers within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the State's police power, whether against the parent's claimed control of the child or one that religious scruples dictate contrary action."

In the cited case it is notable that though three opinions were written and the case was decided on a 5 to 4 basis, the whole Court was evidently of the opinion that a State in its role as *parens patriae* might make any reasonable law designed to fulfill its obligations particularly respecting the welfare of children. The division was on the question whether the particular regulation was reasonable. Thus, Mr. Justice Murphy, dissenting, said (p. 172) that religious training and activity performed by a child would be protected against State interference "* * * except in so far as they violate reasonable regulations adopted for the protection of the public health, morals and welfare." And he further noted that (p. 173) "* * * the power of the State lawfully to control the religious and other activities of children is greater than its power over similar activities of adults * * *." In like manner the dissenting opinion of Mr. Justice Jackson, in which Justices Frankfurter and Roberts concurred, makes it clear that in his judgment the State in the interest of its minor citizens has extensive powers to make reasonable regulations calculated to protect them from harm.

The Court interferes so rarely in the area of legislative activity touching infants that when interference in fact occurs it must be because the power of the State as *parens patriae* has unreasonably collided with rights, the roots of which are exceptionally deep. And when, for in-

stance, the rights of parents are upheld against the authority of the State strong light is shed on the importance of these parental rights.

This is what confers special interest on the holding of this Court in *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535. There the Court held that an effort by a State, believed by the State to be in the interest of its children, to compel attendance at public schools to the exclusion of all private schools must be thwarted because as the Court said:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Two cardinal ideas emerge from the quoted text. First, standardization of children is not the objective of our constitutionally organized society. This principle has been lately restated by the Court in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 641, where Mr. Justice Jackson remarked:

> "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."

To standardize children is not and never has been congenial to American constitutional, political or social principles. This is the first cardinal idea.

Secondly, American tradition is intrinsically against standardization because it insists that the rising genera-

tion must not fall into the grasp of State omnipotence. The American child is not primarily the child of the State. Primarily it is the child of the parents. Parental rights and duties and the corresponding filial duties and rights spring from nature, are antecedent to Government and rise superior to the rights of the State. Such is the second of the cardinal ideas contained in *Pierce* v. *Sisters.* This right of the parent over the education of his child lies squarely at the root of the whole system of non-profit private schools and justifies their genesis and character.

This "private" system exists not for profit but for the public welfare. These schools are not stock corporations organized for profit. They are commonly free schools. For the indigent they are always free. Operating for the public welfare, none of their supervisors, teachers or pupils gains benefits of a private-profit character. The whole benefit of a non-profit private school system, regulated in material respects by the State, is a public benefit. The State has an interest in such schools not only strong enough to support its regulatory activities but strong enough, correlatively, to sustain such reasonable contributions to the well-being of the system as will serve to protect or enhance the public benefits arising from and justifying its existence.

From the constitutional standpoint, therefore, as well as from the historical and sociological standpoints, it is a mistake to consider non-profit private schools including denominational schools to be as inferior in status to the public schools. It is a mistake to think of the former as existing *de facto* in contrast with the latter assumed to exist *de jure.* It is to speak in an invidious idiom to call non-profit private schools "protest schools" and to refer to their pupils as "withdrawal pupils". That the non-profit private school system expresses the deep-seated life convictions of minorities gives no warrant for classifying that system as beyond the constitutional pale.

Indeed the degree of liberality in the public treatment of minorities best measures the strength of the freedoms secured to minorities by the Constitution.

That the appellant conceives the non-profit private school to be a "protest school" as that expression is sometimes used appears from his statement (brief p. 25) that "the sending of children to private schools, whether religious or nonsectarian, is an excuse for not utilizing the public facilities afforded by the State * * *." And again he says (brief p. 26) "The exemption thus afforded is because the parents are ready, willing and able to send their children to private schools and to the particular school of their own choice." If a parent is regarded as needing an exemption or an excuse before sending his child to a non-profit private school, it is implied that somehow the original and sole right to provide education for children rests with the State. This reasoning cannot be reconciled with the principle stated by *Pierce* v. *Society of Sisters (supra)*, and more recently by this Court in *Prince* v. *Massachusetts*. The parental right to control the education of a child is the original right while that of a State is derivative.

On the other hand it is to be noted that these schools are in no small measure subject to public control. States commonly make laws touching them. These laws impose standards to be satisfied by the teachers, require regularity of attendance, fix the duration of the school year and prescribe courses of study. Such schools, thus regulated by public authority, year after year graduate to the general community thousands of pupils who in due course take their places as citizens, soldiers, taxpayers, business men, parents and voters. In brief, these graduates of non-profit private schools take up obediently the discharge of all duties proper to citizens and they also rightfully claim to enjoy all rights appertaining to citizens.

While it is true that in recent years some of the States have been neutral or unfriendly to non-profit private schools, that neutrality or hostility has been a matter of purely State policy, often embodied in the State constitutions. These constitutions not infrequently contain specific restrictions on State aid to non-profit private schools, especially those under the auspices of a religious denomination.

However the Federal Constitution has never been deemed to require any such discrimination against non-profit private schools. In fact, the Blaine proposal for a constitutional amendment was considered necessary in order to supply a constitutional basis, otherwise lacking for such discrimination.

As submitted to the Senate August 14, 1876 it contained the following text (4 Congressional Record, pt. 6, p. 5580):

> "No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught; and no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; * * *."

The proposed amendment of which the quoted text is a part also contains the statement that

> "No State shall make any law respecting an establishment of religion * * *."

And this proposed amendment according to House Document 551 of the Seventieth Congress, Second Section, (§ 72) since 1875

> "• • • has been re-introduced twenty times, but only once reported on by the committee to which referred, which report recommended that the resolution do not pass."

The Blaine amendment and its subsequent history evidence the non-existence of any Federal constitutional prohibition of aid to non-profit private schools. The indications of this evidence are confirmed by the decisions of this Court. This Court has shown directly and by implication that we have no national principle inimical to the non-profit private school system. Its right to exist *de jure*, its status as an instrumentality for giving expression to natural parental rights and its utility within the National framework of education—all these principles have been recognized by the decisions of this Court. (*Pierce* v. *Society* of Sisters, 268 U. S. 510; *Meyer* v. *Nebraska*, 262 U. S. 390; *Quick Bear* v. *Leupp*, 210 U. S. 50; *Prince* v. *Massachusetts*, 321 U. S. 158; *Farrington* v. *Tokushige*, 273 U. S. 284.)

It is a fair conclusion to say that *in the Federal perspective* the non-profit private schools and the public schools may be regarded as branches of an over-all prevailing system of general education. In the welfare of that system viewed in its totality the State has, because it must have, a profound interest. For the State to aid one branch of the system as well as the other cannot but serve the public welfare, health, morality, good order and best interests of the community since educational institutions reach to the nerve of society and decide more than any other environmental element the shape of things to come.

From the standpoint of the Federal Constitution therefore there is no basis for prohibiting incidental public aid

to non-profit private schools unless such incidental aid must be discountenanced on the ground that laws supplying it are laws "respecting an establishment of religion." To this possibility consideration may now be given.

POINT IV

Laws granting public incidental aid on a non-discriminatory basis to non-profit private schools including such schools as are conducted under denominational auspices are not laws "respecting an establishment of religion".

A school does not lose the character of a school by virtue of teaching moral principle and religious truth. Certainly denominational schools and particular churches bear relations to one another. But relationship and substantive identity are very unlike one another.

Religion, regarded simply as religion, appears in organized form as church—its creed, cult and rites. In point of fact there are a multitude of "religions" or churches in the American scene. Their plurality is a consequence of longstanding differences in religious belief.

"An establishment of religion" implies that public authority assumes "a guardianship of the public mind" (*Thomas* v. *Collins*, 323 U. S. 516, 545) in consequence of the choice of some particular religion as the official State religion. A real establishment of religion could not occur unless the State singled out one particular church for special public recognition and at the same time denied equal juridical status to other existing churches.

If one particular church be not selected as the instrument for guardianship of the public mind then none is chosen. So far as the State is concerned, "in this field every person must be his own watchman for truth because the forefathers did not trust any government to separate the true from the false for us. *West Virginia State Board*

of Education v. *Barnette*, 319 U. S. 625," (*Thomas* v. *Collins, supra*, at page 545.)

Public authority in the American concept of government does not and cannot enter the pluralistic world of organized believers who as believers give visible form to their respective churches. Public authority can and does take cognizance of the existence of the various churches and adopts measures to restrain such manifestations of organized religion as are offensive to the public judgment in the matter of morality *e. g.*, polygamy. At the same time public authority takes positive steps in a general way to encourage all religions without however tampering with the various forms of sovereignty present within the respective churches.

Religious education, understood as meaning what actually goes on in schools under religious auspices, is decidedly different from religion as religion. The citizen is present in the school as prominently as is the believer. There the child is prepared for his civic status and responsibility as well as for legitimate religious objectives essential to his complete well-being.

In the measure that the child *as citizen* is in the denominational school he is within the reach of public authority. This fact is recognized and acted upon by the State at many points. From the standpoint of public authority the circumstance that a child while gaining his education as a citizen is likewise receiving instruction in religion is immaterial. The State cares nothing about the content of that religious instruction provided it is within the confines of permissible expression as measured by the requirements of public morality.

But the State does care deeply about its child citizen and his education. It would confess to a strange and unintelligible impotence if it felt itself obliged to deny its aid to a child citizen merely because in course of his education he also learns religious beliefs. In effect the

State would be confessing itself obliged to treat these children as second class citizens; citizens of inferior standing. This impotence to aid them would create inequalities in the treatment of children in consequence of their religious beliefs.

In *Chance et al.* v. *Mississippi State Textbook Rating and Purchasing Board*, 190 Miss. 453, though the case dealt with a State constitution remarks were made by the Court so apt to the present point that they deserve to be mentioned at length. The Court said (pp. 467-468):

> "Useful citizenship is a product and a servant of both the church and the state, and the citizen's freedom must include the right to acknowledge the rights and benefits of each, and to import into each the ideals and training of the other.
>
> There is no requirement that the church should be a liability to those of its citizenship who are at the same time citizens of the state, and entitled to privileges and benefits as such. Nor is there any requirement that the state should be godless or should ignore the privileges and benefits of the church. Indeed, the state has made historical acknowledgment and daily legislative admission of a mutual dependence one upon the other.
>
> It is the control of one over the other that our Constitution forbids. Sections 18, 208. The recognition by each of the isolation and influence of the other remains as one of the duties and liberties, respectively, of the individual citizen. It is not amiss to observe that by too many of our citizens the political separation of church and state is misconstrued as indicating an incompatibility between their respective manifestations, religion and politics. The state has a duty to respect the independent sovereignty of the church as such; it has also the duty to exercise vigilance to discharge its obligation to those who, although subject to its control, are also objects of its

bounty and care, and who regardless of any other affiliation are primarily wards of the state. The constitutional barrier which protects each against invasion by the other must not be so high that the state, in discharging its obligation as parens patriae, cannot surmount distinctions which, viewing the citizen as a component unit of the state, become irrelevant.

The religion to which children of school age adhere is not subject to control by the state; but the children themselves are subject to its control. If the pupil may fulfill its duty to the state by attending a parochial school it is difficult to see why the state may not fulfill its duty to the pupil by encouraging it 'by all suitable means.' The state is under duty to ignore the child's creed, but not its need. It cannot control what one child may think, but it can and must do all it can to teach the child how to think. The state which allows the pupil to subscribe to any religious creed should not, because of his exercise of this right, proscribe him from benefits common to all."

The distinction between schools where religion is taught and the establishment of religion was noted by the Solicitor General of the United States, Henry Martyn Hoyt, in the argument he presented in *Quick Bear* v. *Leupp*, 210 U. S. 50. The Solicitor General said (p. 74):

"The Constitution provides that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.' A religious establishment, however, is not synonymous with an establishment of religion. See Bradfield v. Roberts, 175 U. S. 291, upholding an appropriation for a Roman Catholic hospital. A school, like a hospital, is neither an establishment of religion nor a religious establishment, although along with secular education there might be, as there commonly is, instruction in

morality and religion, just as in a hospital there would be religious ministrations."

When are laws to be regarded as laws respecting "an establishment of religion"? The antecedents of that constitutional expression are ready to hand by reason of the research of Mr. Justice Reed reported in his opinion, dissenting (but not on this score) from the majority of the Court, in *Murdock* v. *Pennsylvania*, 319 U. S. 105, 124-125. It is there shown that the House originally proposed the following text for the First Amendment to the Constitution:

"Congress shall make no law establishing religion * * *."

In the Senate the text assumed this form:

"Congress shall make no law establishing articles of faith, or a mode of worship * * *."

And Mr. Madison said (according to Mr. Justice Reed):

"* * * that he apprehended the meaning of the words on religion to be that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."

The text as ultimately ratified is cast in language technically associated with the creation and maintenance of a formal State Church. This language moreover specifically imports the English State Church System which then was known and is still known as The Establishment.* This use of the word "establishment" to denote The

* That it was not every establishment but a special kind of national establishment of religion which was thought offensive readily appears from the fact that several States ratifying the First Amendment then had and for years thereafter continued to have their respective forms of establishments of religion. (*Cf. Cobb, S. H., The Rise of Religious Liberty in America, New York, The Macmillan Company*, 1902, pp. 507, 510, 512.)

Establishment, in familiar use at the time our present political society was founded persists in modern England. To illustrate: In The Concise Oxford Dictionary, Third Edition, the definition of the word establishment opens this way:

> "Establishing; Church E., The E., church system established by law; * * *"

In the Third Edition of Black's Handbook on American Constitutional Law, it is said that (p. 518)

> "Establishment of Religion is Forbidden: * * * A church is by law 'established' in a state when it is an institution of the state, under the direct protection and patronage of the state, to the exclusion of other churches or sects, when it is supported by general and public taxation, when its laws, ordinances, and doctrines are a part of the municipal law of the state, so that persons may be punished by the civil authorities for disobedience of them, and when its chief officers are officers of the state or appointed by the civil authorities."

Black's text gives the historical content of "The Establishment". The text of the First Amendment was designed to prohibit Congress from making any laws setting up an establishment of religion on the style of The Establishment.

The Blaine Amendment (*supra*, pp. 19-20) and its history considered in relation to actual practices of the Congress in providing aid to schools under denominational auspices and in dealing directly with hospitals and schools likewise under denominational auspices, show clearly that laws such as the New Jersey Bus Law have never been thought to contain the character of laws "respecting an establishment of religion."

The Appellant apparently desires this Court to make a construction of the First Amendment text wholly independent of historicity. Using canons of constitutional

construction devoid of every mark of objectivity save that of avoiding flagrantly spurious word meanings appellant seeks to construe the word "respecting", employed by the First Amendment, as meaning "glancing at" and the words "an establishment of religion" as descriptive of any religious establishment. Guided by this method of construction he then argues in substance that any law chargeable with barely noticing a religious establishment must be held unconstitutional.

The path of construction sketched above hardly shows "• • • the precision necessary to postulates of judicial reasoning" (*West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 636). It would require first a denial of all historical meaning inhering in the language of the First Amendment. It would thereafter necessitate direct repudiation of the Court's observation in *Bradfield* v. *Roberts*, 175 U. S. 291, that a religious establishment and an establishment of religion are different things. Moreover if the Court were to adopt the appellant's method of construction it would also be led logically to reject its own views in the Selective Service Cases (*Arver* v. *U. S.*, 245 U. S. 366, 389-390) where it was held to be *evidently* unsound to claim that an Act of Congress exempting ministers of religion from military service was an Act respecting an establishment of religion.

Consider the various stages in the thinking which would start with a simple bus law and conclude that it is a law respecting an establishment of religion. They are somewhat as follows:

1. On its face this law looks solely to transportation of all children living remote from school. The law is a State effort in aid of smooth execution of its compulsory school attendance policy. The law makes no special provision favorable to non-profit private school children but merely provides for them the same instrumentalities of transportation as are already at the disposal of public school children.

2. But it is a law authorizing transportation of parochial school children because they come within the class of non-profit private school children.

3. And when such children get off the bus they study not only reading, writing and arithmetic but their catechism as well.

4. Such children then are learning the Articles of a Faith and but for the bus carrying them to school they might not be undergoing such instruction since, by hypothesis, they might not have been "withdrawn" from the public schools and hence might be in the public schools, where no formal religious instruction is given.

5. In the alternative: If such children had been transported to the parochial school at private expense, the money spent on bus fares would not have been available for different purposes, that is, in aid of other parochial objectives. (This argument assumes either (a) that the cost of transportation would be borne directly by the parish treasury, for which there is no support in the record, or (b) that a parent who has to spend twenty cents bus fare to send his child to a parochial school will put that much less in the collection plate on Sunday.)

6. Such parochial objectives might not be coextensive with educational pursuits.

7. They might for example, embrace the payment of a curate's salary or the cost of repairing a church roof.

8. A law which as shown in proposition No. 4 encourages "withdrawal" of children from public schools or as indicated by proposition No. 5 releases parochial funds is a law giving aid to a parochial school and implicates possibilities of proposition 7.

9. A parochial school is identical with a particular church.

10. A particular church is a religious establishment.

11. A religious establishment is an establishment of religion.

12. Therefore, since it is forbidden that any law respecting an establishment of religion shall be enacted it follows from proposition Nos. 9, 10 and 11 that the condition of affairs formulated in proposition No. 1 must be pronounced illegitimate.

Does it not seem that to glide in that manner by a process of uncritical associationism is a form of reasoning which, though picturesque, lacks sinews? Is it not in the order of that kind of over-simplification which, in the words of Mr. Justice Jackson "lacks the precision necessary to postulates of judicial reasoning"?

Actually laws taking cognizance of the existence and operation of religious bodies in the community are not unconstitutional as the Selective Service cases show. Laws "• • • aiding with equal attention the votaries of every sect to perform their own religious duties • • •" (*Terrett* v. *Taylor*, 13 U. S. 43, 49) would not be unconstitutional. Laws exempting religious bodies from taxation on a basis of impartial treatment of all sects are not unconstitutional. All these laws operate directly on existing religious establishments—they necessarily so act—and yet they are not laws "respecting an establishment of religion". They are laws which to use an old distinction "encourage" religion; but laws which "encourage" religion are something very different from laws which "ordain and establish" it (See *Tiffany, Joel*, on Government and Constitutional Law [1867] p. 393).

If a *noli me tangere* principle is not the constitutional principle governing laws directly concerned with actual religious establishments, then by what extension of the "establishment of religion" aspect of the First Amendment could that amendment be brought to bear on this bus law? The law makes no mention of religion and contains no trace of either religious discrimination or religious

establishment. So far as the legislative intention is concerned, it is ancillary to, and co-extensive with, the compulsory school attendance laws of the State. Its purpose is nothing more than the efficient solution of a practical space difficulty involved in getting all children promptly and safely to all schools.

This Court has given expression many times to broad and exalted views on the subject of religious liberty and upon the position such liberty holds in our society. Religious liberty is "* * * that full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles." (*Watson* v. *Jones*, 80 U. S. 679, 728). It is a freedom "* * * available to all, not merely to those who can pay their own way" (*Murdock* v. *Pennsylvania*, 319 U. S. 105, 111). As one of the freedoms secured by the First Amendment it has a "* * * preferred place * * * in our scheme * * *" (*Thomas* v. *Collins*, 323 U. S. 516, 530). Such religious freedom it has been "repeatedly held" is immune to effective sabotage by the State (*Douglas* v. *Jeannette*, 319 U. S. 157, 162).

In addition to affording civic training non-profit schools which chance to be parochial schools give an institutional expression to some forms of religious belief and practice. They are the organic result of the collective convictions of many individuals. Therefore destructive action taken against the parochial school system—a system concededly productive of great good in our pluralistic society—would today be struck down by this Court not merely on the basis stated in *Pierce* v. *Society of Sisters* (*supra*), but also as offensive to the liberty guaranteed by the First Amendment.

The Jehovah Witnesses' cases have given rise to sharpened perceptions of the nature of religious liberty. In that line of decisions religious liberty meets State police power in forthright collision. Because religious liberty

occupies a preferred position in our constitutional scheme, this Court has held that in such collisions Power must yield to Liberty except in the case when liberty collides with the special power of the State reasonably functioning as *parens patriae.*

If the bus law in New Jersey be deemed incidentally to extend public aid to denominational schools (as members of the class of non-profit private schools), it is worthy of note that the case becomes one where State power and the religious and parental liberties of the citizen are not in opposition to one another. On the contrary this is an instance where the State lends its efforts to facilitate the exercise of these acknowledged and precious liberties. Is it then not true to say that non-discriminatory treatment of such schools by a State Legislature far from coming within the orbit of constitutional suspicion is a measure constitutionally worthy of affirmative Federal approbation?

When this cause is submitted to dispassionate judgment and dispassionate judgment alone remains actively functioning perhaps the whole substance of a sound approach to this and analogous questions is to be found in the following statement appearing in the report of the President's Advisory Committee on Education, February 1938, pp. 53-54 (Quoted by Moehlman, The American Constitutions and Religion, pp. 140-141):

> "Consideration should be given, however, to the fact that large numbers of children receive instruction in non-public schools and that the maintenance of schools under non-public auspices results in a significant reduction in public expense.
>
> Many of the services of public schools should be available to children regardless of whether they are enrolled in public schools for instruction. It is therefore recommended that such portions of the general aid as may be allocated in the joint plans to the

purchase of reading materials, transportation and scholarships be made available so far as Federal legislation is concerned for the benefit of pupils both in public and in non-public schools. The Committee also recommends that local public schools receiving Federal aid be authorized to make their health and welfare services available to pupils in non-public schools. The conditions under which health and welfare services and aid for reading materials, transportation, and scholarships may be made available for pupils in privately controlled schools should be determined by the State, or by the local school jurisdiction receiving the grants if the States so determine."

POINT V

The "wall of separation" between church and state is not undermined, breached or cracked by this transportation law. Abandoning metaphor, if this law be deemed to aid parochial schools it nevertheless does not offend the First Amendment because that amendment though negativing a state church and coercive activity directed against conscience does not deny to the forty-eight States power to serve their own legitimate educational interests in their citizens as citizens.

The appellant's argument in this respect takes the following essential form: The police power of the State must give way when it collides with specific constitutional limitations to be found in the Fourteenth and First Amendments to the Constitution. But it is contended that the New Jersey statute collides with the First Amendment. It is said to do so because it gives aid and support to denominational schools where religion, as well as other subjects, is taught. This is considered non-permissible aid because it is regarded as contravening the principle of absolute separation of Church and State as embodied in the First Amendment.

It is evident that underlying this argument is a theory of the meaning of the First Amendment. This theory in substance asserts that the State has neither power to enact any law prohibiting the free exercise of religion nor power to make any law in any way helpful to religion. Both restraint on religion and aid to it, the argument runs, go counter to the principle of separation of Church and State.

In more specific terms it is claimed that where aid is ordered to all school children and their parents regardless of whether they attend public or non-profit private schools such aid amounts to taxation for the support of religion in so far as parochial school parents and children are concerned. But it is said the First Amendment proscribes taxation which in any manner aids any religion. Therefore though the aid is not given in terms, is not given to parents of any particular religious denomination and is not given in order to aid religious organizations but is given by the State to promote its own interests in its own citizens such aid is said to be unconstitutional. It is the bare presence of religious teaching concomitant in some private schools with the secular training of the children which is ground for constitutional offense.

The Jeffersonian metaphor of a "wall of separation" between Church and State has validity. Like any metaphor, however, it must be closely analyzed in order that its true content may be revealed.

The "wall of separation" metaphor rightly understood does reflect definite ethical and social realities. In the first place in the United States all citizens are members of a single political community, but not all are members of a single religious community. This situation of fact must be met. To meet it there has been laid at the basis of constitutional policy a distinction in man himself between the civic person or citizen and the religious person or believer or perhaps, non-believer. The

citizen, in his totality as citizen, is wholly within the jurisdiction of the State and, apart from Constitutional limitations, is subject in all respects to its authority. As citizen he should enjoy all benefits of State action taken in behalf of citizens in the name of public welfare, public morality and the common public good.

The believer or non-believer as such is not within the jurisdiction of the State, is not subject to State authority (coercion) and must not be subject to pressure by reason of the legitimate exercise of his rights as believer or non-believer. State authority may properly coerce the civic conscience. The religious conscience, however, is immune from all State coercion. There is therefore a "wall" in a genuine sense of that expression that separates church and state. It is legitimately and necessarily erected between the distinct areas of the life of an individual, over which the authority of the State and the authority of conscience respectively rule.

As the State may not go beyond the wall with its coercion to compel the believer or non-believer in matters regarding his religious belief, his mode of worship and the like (and such is the substantial meaning of religious liberty) so too no church may go beyond the wall to use its authority to enforce conformity to its beliefs as the condition of full citizenship. Full citizenship is unrelated to religious belief or the absence of religious belief. Full citizenship is not to be conditioned on adoption of a particular church. Establishment of religion as understood at the time of adoption of the First Amendment and for many years thereafter actually made conformity to a particular church a condition of full citizenship. For example, it was originally the Colonial law of Virginia that baptism in the Episcopal Church was an essential element for initiation into full citizenship of that State.

The essential purpose of the "wall" of separation between Church and State as erected by the First Amend-

ment is to prevent the invasion of either area, civic or religious by non-competent authority (cf. *Chance v. Mississippi Textbook Rating and Publishing Board, supra*).

We are now in a position to see whether appellant has correctly located the "wall of separation" in respect of the present case, or whether he has been misled by the metaphor and has transformed the legitimate "wall" into an illegitimate "iron curtain" separating areas between which there should be free passage.

It is essential to observe that between 1791 and 1946 factual changes have taken place such that in 1946 the relevant body of facts states a problem for location of the wall which problem was non-existent in 1791. In seeking the outstanding new facts which furnish background to the present problem for locating the wall one readily finds them to be (1) the massive fact of the free American system of education with its two-fold component, public and non-profit private schools; and (2) the definitive assumption by the State as *parens patriae* of an increasingly active role in promoting general education as a principal factor in the general welfare.

The non-profit private school system is a *de jure* component of the American educational system. It has thousands of schools and millions of pupils. It did not slip into existence in some obscure corner of the Nation as something of questionable origins. Like the public school system it has moved over the years from small beginnings to large and important dimensions. It answers to the belief of an impressively large number of American citizens—parents who believe not on religious grounds alone but on grounds of public welfare as well—that education should not be divorced from formal religious instruction.

The non-profit private school exists in consequence of exercise by millions of parents of the parental right in respect of the education their children should receive. For large numbers religious schools fashion out the results of

religious belief on the one side and secular public welfare requirements on the other. The right of parents to have such beliefs, and having them to act to create religious schools is guaranteed to them by the Constitution.

The question now may be put this way: Does the exercise of parental choice in the matter of education necessarily "wall off" some citizens from participation in ordinary educational benefits decreed by the State in the discharge of its responsibility as *parens patriae*? The theory of the appellant is that when parental choice is exercised in the direction of a non-profit private school where religious instruction is given, such choice erects the "wall of separation".

The underlying argument to support this conclusion is that the parental decision to send a child to the non-profit private school is free in every respect. The freedom to choose a particular school is guaranteed against State interference by the First Amendment (and the Fourteenth); however, once this choice is made, appellant says that the State is powerless by reason of these Amendments to assist in carrying the burdens the choice imposes—burdens which are assumed by the State when another educational choice is made.

The appellant's theory and the arguments he uses to support it comprise (1) a distortion of the factual situation; (2) a denial to the State of the full range of its power *parens patriae*; (3) an effective frustration of the parental right in education, arising from a misunderstanding of the free American system of education and the rightful place in that system of religious and other non-profit schools; and (4) above all (and here one reaches the central fallacy) a distortion of the principle of separation of Church and State by the erection of a false "wall" not between Church and State but between the State and a large area of the State's own interests.

1. *Distortion of the factual situation.*—The decision of the parent to send a child to a non-profit private school is not free in every respect. Compulsory education laws oblige the parent to make a choice between schools. In making that choice, the conscience of the parent is not brought under State cognizance; the duty of the State to observe the distinction between the civic person and religious person obliges the State to disregard the religious or other motives which may determine the choice made by the parent. Hence, in the eyes of the State, when the choice is made, it is made under State compulsion. So far as the State may legitimately know the facts this decision (to send a child to a nonprofit private school) is made in obedience to a State law.

2. *Denial to the State of the true range of its power as parens patriae.*—But suppose, what is not the fact, that the choice were purely voluntary: it would still not have the effect attributed to it by appellant—that of forbidding the State to assist the parent who made it in carrying the burdens it imposes.

In the theory of appellant the State would say to such parent: "I recognize your right to a free choice of a school for your child; but if you make the choice of a private school, under religious auspices, mind the consequences: you will cut yourself off from me—I shall no longer be able to be *parens patriae* to you or to your child—I shall be forbidden to acknowledge your children as my children—I shall have to disown them; for the First Amendment, which forbids me to deny you this choice, also obliges me to deny you and your children my aid as *parens patriae.*"

This denial is cardinal to the appellant's position. The theme is education. Education here refers to the schooling of citizens under the disability of infancy. That disability does not vanish because a child attends a parochial school. Nor is he any less the citizen on that account.

His presence in such school in fact is not the outcome of his own significant choice. Practically speaking he has no choice in the matter.

When considering itself as *parens patriae*, the State may surely consider that it is *parens hujus patriae*—that it exercises its sovereignty in a particular set of conditions actually existing in this country. As a matter of fact the religious factor and the factor of parental right, free exercise of which is guaranteed by the Constitution, place millions of infant citizens in parochial schools for the sake of their education. For children thus situated the State surely is still *parens patriae*. The State may properly consider the factual condition so that its laws as framed and administered for the benefit of its infant citizens may provide for a flow of State aid equally to all children regardless of their religion.

3. *Frustration of parental right based on misunderstanding of the place of religious schools in the American system of education:* What appellant appears to ask is a definitive pronouncement that only a system of public education, erected and completely controlled by the State and devoid of all opportunity for religious education, has the right to public aid of any kind; his reason is basically that no other system of schooling is truly rooted in American life. But the Constitution does not say this. It contradicts this opinion. *Pierce* v. *Society of Sisters* (*supra*) was inspired by a different conception. Moreover history does not bear it out.* The results in citizenship flowing from the "religious" schools involve no consequences giving comfort to the idea that they merit a position of inferiority such that if a State chooses to aid them this Court must strike down such effort by the State to cultivate its own interests.

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* See Point II.

The assumption that religious schools are illegitimate in their origins is perhaps what leads appellant to regard these schools as existing by bare toleration. Contaminated in his eyes by religious instruction they must be deemed religious establishments, any aid to which means a penetration by the State of the "wall of separation." He would encumber their operation with burdens that are not to be laid on the operation of public schools. To give effect to any such conception lays the foundation for gradual destruction of a system of schools holding a high, worthy and indispensable place in American life.

4. *Erection of a false "wall" (or a wall in the wrong place).* Here is the heart of the falsity in appellant's theory. From the wall separating the sphere of the State's interest (all matters pertaining to the common temporal good) from the sphere of the church's interest (all matters affecting the forum of religious belief, etc.), he concludes to the existence of a wall between public schools and private schools including those under religious auspices. The falsity of the conclusion appears upon considering for a moment the peculiarity of the field of education. In this field the interests of the State and of the Church interpenetrate. Here no "wall" can be erected, dividing the educational field into two areas, with an impassable barrier between them, as if what went on in one area had nothing in common with what goes on in the other. As a matter of fact, the same fundamental enterprise goes on in both areas—the promotion of the general welfare through the preparation of an educated citizenry.

The interest of the State in running schools is the formation of men and women equipped for participation in the common tasks of this life. The Church shares this same interest; otherwise the Church would not run *schools*. The function of a school is essentially preparation for every day life; primarily, it cultivates the intel-

lectual virtues, to enable men to live as men—rational creatures, members of rational society. The fact that a parochial school does more than this—that it also recognizes man's transcendent destiny, and endeavors to help him achieve it—does not deprive it of the essential character of a school. Because it recognizes that man is a religious person as well as a civic person, it does not for that reason cease to educate him as a civic person, and by so doing to contribute to the general welfare.

If this be so, the State should not feel itself obliged to say to a portion of its citizenry: "If you choose to go to a parochial school, you go behind a wall, and I am forbidden to follow you with my aid, because what goes on behind that wall is not in my interest—the promotion of the public welfare—and therefore is of no interest to me. The only place where my interests are promoted is in the public school, and hence I shall aid it alone." This is a very arbitrary self-denying ordinance passed by the State upon itself—that it should erect a wall between itself and a whole area of public interest.

When a State raises no such false wall nothing in the Federal Constitution compels it to do so.

POINT VI

Conclusion

The judgment below should be affirmed because

(a) the challenged law, as authoritatively construed by the highest Court of New Jersey, serves a public purpose as an ingredient in a body of law operating to compel school attendance by minors. It is a law having no other relevant design or effect;

(b) the circumstance that the law affords aid to parents of parochial school children does not affect the matter, first, because the aid given is not given on denominational

grounds; second, because the aid supplied is to parents, children and the State altogether without regard to religious considerations; and third, because it is in the larger sense conducive to strengthening the total school system of the State, which comprises not only the common schools but also non-profit private schools; and

(c) finally because this law, if deemed to confer incidental benefits upon the non-profit private school system including denominational schools, does not on that account approach in the slightest manner the status of a law which infringes the rights of conscience (for it is not a discriminatory measure) nor is it a law which in the slightest degree amounts to an Act "respecting an establishment of religion".

Respectfully submitted,

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Appendix

Section 18: 14-8 of the Revised Statutes as amended by Chapter 191 of the Laws of 1941.

"18:14-8. Whenever in any district there are children living remote from *any* schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, *including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.*

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.

"Nothing in this section shall be so construed as to prohibit a board of education from making contracts for the transportation of children to a school in an adjoining district when such children are transferred to the district by order of the county superintendent of schools, or when any children shall attend school in a district other than that in which they shall reside by virtue of an agreement made by the respective boards of education.

"2. This act shall take effect July first, one thousand nine hundred and forty-one." (Amendment of 1941 in italics.)

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 52.

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v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER, ET AL., *Appellees*.

On Appeal from the Court of Errors and Appeals of the State of New Jersey.

BRIEF OF STATE COUNCIL OF THE JUNIOR ORDER OF UNITED AMERICAN MECHANICS OF THE STATE OF NEW JERSEY, AS AMICUS CURIAE.

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INDEX.

	Page
The Importance of the Issue	2
Transportation of Sectarian School Pupils	3
Use of Tax Revenues for Sectarian Purposes	7
No Analogy Between Instant Case and Precedent in Textbook Case	10
Effect of the Court's Decision	11

TABLE OF AUTHORITIES CITED.

CASES.

Adams v. County Commissioners of St. Mary's County, 180 Md. 550, 26 A. (2d) 377 (Md. 1942)	6
Board of Education of Baltimore County v. Wheat, 174 Md. 314, 199 Atl. 628 (Md. 1938)	4, 6
Borden v. Louisiana State Board of Education, 168 La. 1005, 123 So. 655 (La. 1929)	10
Bradfield v. Roberts, 175 U. S. 291 (1899)	12
Cochran v. Louisiana State Board of Education, 168 La. 973, 123 So. 664 (La. 1929), *affirmed* 281 U. S. 370 (1930)	11
Everson v. Board of Education of Ewing Township, 133 N. J. L. 350, 44 A. (2d) 333 (N. J. 1945)	4, 6
Gurney v. Ferguson, 190 Okla. 254, 122 P. (2d) 1002 (Okla. 1941), *cert. den.* 317 U. S. 588 (1942)	5
Hlebanja v. Brewe, 58 S. D. 351, 236 N. W. 296 (S. D. 1931)	5
Judd v. Board of Education, 278 N. Y. 200, 15 N. E. (2d) 576 (N. Y. 1938)	4
Mitchell v. Consolidated School District, 17 Wash. (2d) 61, 135 P. (2d) 79 (Wash. 1943)	5
Nichols v. Henry, 191 S. W. (2d) 930	6
People v. Barber and Miller, 42 Hun. 27 (N. Y. 1886)	12
Sherrard v. Jefferson County Board of Education, 294 Ky. 469, 171 S. W. (2d) 963 (Ky. 1942)	4
State ex rel. Traub v. Brown, 6 Harr. 181, 172 Atl. 835 (Del. 1934)	5
State ex rel. Van Straten v. Milquet, 180 Wis. 109, 192 N. W. 392 (Wis. 1923)	5
Terrett v. Taylor, 13 U. S. (9 Cranch) 42 (U. S. 1815)	12

STATUTES. Page

California Statutes and Amendments to the Codes, 1943, Ch. 71, sec. 16257, p. 634 3
Colorado Statutes Annotated, Ch. 146, secs. 114, 115.. 4
Illinois School Code, 1945, Art. 29, sec. 7 3
Kentucky Revised Statutes, 1944, sec. 158.115, as added in 1944 4
Louisiana General Statutes (Dart), 1939, Title 18, sec. 2248 4
Maryland Acts of 1937, Ch. 185 3
Maryland Acts of 1939, Ch. 140 3
Massachusetts Acts of 1936, Ch. 390 3
Michigan Statutes Annotated, Title 15, sec. 15.457, as amended in 1945 3
Revised Laws of New Hampshire, 1942, Ch. 135, sec. 9 3
New Jersey Statutes Annotated, 1940, Title 18, sec. 18: 14-8, as amended in 1941 ..... 3, 7
New Jersey Laws, 1875, p. 72 9
New Jersey Laws, 1876, p. 433 9
New York Consolidated Laws, Ch. 16, sec. 206 (18) 3
Throckmorton's Ohio Code, 1940, Title V, sec. 7731 4
Oregon Compiled Laws Annotated, 1940, Title 111, sec. 111-874 3

CONSTITUTIONS.

Arkansas Constitution of 1874, Art. XIV, sec. 2 10
Colorado Constitution of 1876, Art. V, sec. 34 10
Nebraska Constitution of 1875, Art. VII, sec. 11 10
New Jersey Constitution, Art. 1, sec. 3 8
New Jersey Constitution, Art. 4, sec. 7, par. 6 8
New York Constitution, Art. XI, sec. 4, as amended in 1938 4
Pennsylvania Constitution of 1875, Art. III, sec. 17, Art. X, sec. 2 10
Texas Constitution of 1876, Art. I, sec. 7; Art. VII, sec. 5 10

OTHER AUTHORITIES.

Opinions of the Attorney General of Ohio, 1927, No. 1094 4
Proceedings, New Jersey Constitutional Convention, 1844 9

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BRIEF OF STATE COUNCIL OF THE JUNIOR ORDER OF UNITED AMERICAN MECHANICS OF THE STATE OF NEW JERSEY, AS AMICUS CURIAE.

The "State Council of the Junior Order of United American Mechanics of the State of New Jersey" is a fraternal patriotic order. It was incorporated by an act of the Legislature of the State of New Jersey in the year 1875. It has approximately 20,000 members in its subordinate councils throughout the state. One of its objects, as stated in its State Council Constitution, is to foster the public school system. Throughout its long history it has taken a keen interest in all matters pertaining to the public schools and has actively supported legislation and various movements conducive to the improvement of the public schools. It is dedicated to the principle of separation of church and state.

THE IMPORTANCE OF THE ISSUE.

The case before the Court has a significance far outreaching the particular circumstances in its underlying facts. It is a case dealing with the transportation of children to sectarian schools. This in itself is an important issue, one which has come before a number of state courts in the last twenty-five years. It is a currently live issue. Great emphasis upon consolidation of rural schools in recent years has made necessary the transportation of pupils.

However, the instant case involves more than the transportation of pupils to a consolidated school. It is more than a question of the validity of a statute permitting sectarian school pupils to ride in public-owned school buses. The situation in New Jersey involved the payment of tax revenues to parents of children to reimburse them for the transportation expenses of their children attending sectarian schools. Therefore, the issue not only deals with transportation of sectarian school pupils in a general way, but it also deals specifically with the use of public moneys for sectarian purposes.

These facts bring into the case the whole panorama of state aid to sectarian schools and the separation of the church from the state. The desirability of keeping the church separated from the state was apparent to the framers of the Federal Constitution who had themselves witnessed, or were not many generations removed from, religious strife which had convinced them that complete religious freedom and separation of the church and the state should be one of the basic principles in the new Government. State constitutions are more specific in this regard than the Federal Constitution. Every state constitution guarantees religious liberty and in more or less detail defines the intention of the people to keep the church and state separated. One phase of the separation of church and state involves the compulsory support of sectarian institutions, through the use of revenues for aid to such schools.

In the early days of our Country, many schools were operated by churches and as the state gradually took over the function of public education, there was for a time a legal link between church-sponsored schools and the state. By the beginning of the nineteenth century the rudiments of state public-school systems had been established. Schools maintained by private trusts and religious groups were operated along side of the public schools which were state supported. Occasionally a grant of public funds was made to a privately operated school, since, until the Civil War, few states specifically prohibited the use of public funds for sectarian education. However, after the middle of the century, states began to amend their constitutions to prohibit the use of tax revenues for sectarian purposes. Today, all states except Maine and North Carolina so provide. The instant case therefore is of interest nationally.

TRANSPORTATION OF SECTARIAN SCHOOL PUPILS.

A number of states have legislation permitting the transportation of sectarian school pupils at public expense. California Statutes and Amendments to the Codes, 1943, Ch. 71, sec. 16257, p. 634; Illinois School Code, 1945, Art. 29, sec. 7; Maryland Acts of 1937, Ch. 185 (Baltimore County); Maryland Acts of 1939, Ch. 140 (St. Mary's County); Massachusetts Acts of 1936, Ch. 390; Michigan Statutes Annotated, Title 15, sec. 15.457, as amended in 1945; Revised Laws of New Hampshire, 1942, Ch. 135, sec. 9; New Jersey Statutes Annotated, 1940, Title 18, sec. 18, 14-8, as amended in 1941; New York Consolidated Laws, Ch. 16, sec. 206 (18); Oregon Compiled Laws Annotated, 1940, Title 111, sec. 111-874. Some of these laws give to private- and sectarian-school pupils the same transportation privileges enjoyed by pupils attending the public schools, provided no new routes are established and the children live on or near an established public-school bus route. Others are unqualified.

The New York law, *supra*, was enacted to implement a constitutional amendment adopted in 1938 and allowing

transportation of sectarian-school pupils as an exception to the otherwise general constitutional prohibition against the use of public funds for sectarian purposes. New York Constitution, Art. XI, sec. 4, as amended in 1938. The constitutional amendment had been adopted because the New York courts had declared a prior law permitting transportation of parochial school pupils unconstitutional under the Constitution as then written. *Judd* v. *Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576 (N. Y. 1938).

Kentucky also permits private-school pupils to be transported on public school buses, but only if the cost is paid out of county funds without the use of any educational funds, and where the roads are dangerous because of absence of any sidewalks. Kentucky Revised Statutes, 1944, sec. 158.115, as added in 1944. This law was enacted after the Kentucky courts declared unconstitutional a previous statute permitting sectarian-school pupils to be transported in public-school buses if they lived a distance from the school they attended. *Sherrard* v. *Jefferson County Board of Education*, 294 Ky. 469, 171 S. W. (2d) 963 (Ky. 1942).

In addition to the states where there is explicit permissive legislation, several other state pupil-transportation laws are written in language so general as to be applicable to both public- and private-school pupils. 1935 Colorado Statutes Annotated, Ch. 146, sec. 114, 115; Louisiana General Statutes (Dart), 1939, Title 18; sec. 2248; Throckmorton's Ohio Code, 1040, Title V, sec. 7731. However, the Ohio Attorney General has ruled that the Ohio statute refers only to public-school pupils. 1927 O. A. G. No. 1094. In the other two states, Colorado and Louisiana, sectarian-school pupils are transported under the general transportation law.

None of these current laws, *supra*, has been passed upon by the respective state courts except the Maryland, Kentucky, and New Jersey laws. *Board of Education of Baltimore County* v. *Wheat*, 174 Md. 314, 199 Atl. 628 (Md. 1938); *Everson* v. *Board of Education of Ewing Township*, 133

N. J. L. 350, 44 A (2d) 333 (N. J. 1945). However, other statutes permitting the transportation of sectarian-school pupils have been declared unconstitutional in Delaware, Oklahoma, and Washington. *State ex rel. Traub* v. *Brown*, 6 Harr. 181, 172 Atl. 835 (Del. 1934); *Gurney* v. *Ferguson*, 190 Okla. 254, 122 P. (2d) 1002 (Okla. 1941), *cert. den.* 317 U. S. 588 (1942); *Mitchell* v. *Consolidated School District*, 17 Wash. (2d) 61, 135 P. (2d) 79 (Wash. 1943).

Two states in which there has been no permissive legislation have met the problem under general transportation laws. The first case came up in Wisconsin when two out of about thirty transported pupils attended a public school, while the other twenty-eight attended sectarian schools. The Wisconsin court declared the transportation contract void. There was no specific legislation authorizing the transportation of sectarian-school pupils, and the transportation contract had been consumated under the power of the school district to close its school and transport pupils to an adjoining district. The court held that this power enabled the school district to contract for transportation of pupils to public school only. *State ex rel. Van Straten* v. *Milquet*, 180 Wis. 109, 192 N. W. 392 (Wis. 1923).

Approximately ten years later, in South Dakota, a different question arose when a school was consolidated. As with most such statutes, the permissive legislation allowed the district to transport the pupils to an adjoining district, or to pay for their lodging and board in the adjoining district. One parent sent his children to a parochial boarding school and attempted to collect from the school district the cost of their tuition, board and lodging. The court held that the responsibility of making provision for the schooling of pupils is not discharged by paying a sum of money to the parents, permitting them to send their children wherever they wish; nor could the district pay the sectarian school since it is not a part of the public-school system of the state. *Hlebanja* v. *Brewe*, 58 S. D. 351, 236 N. W. 296 (S. D. 1931).

In only two states have the courts unqualifiedly approved the transportation of sectarian-school pupils at public expense—Maryland, and New Jersey in the instant case below. *Board of Education of Baltimore County* v. *Wheat, Everson* v. *Board of Education*, both *supra*.* The theory propounded in these two cases was different. The Maryland court upheld transporting sectarian-school pupils under the police power of the state. The majority of the New Jersey court held that the constitutional restriction upon the use of school-funds for public-school purposes was limited only to the perpetual fund of the state. With regard to the Maryland theory, it might be refuted by the general principle that the police power does not contravene the constitutional provisions except in very unusual circumstances, not applicable in pupil-transportation cases. The New Jersey theory will be discussed in a later section of this brief.

In the meantime, Maryland extended the scope of its approval of transportation of sectarian-school pupils in a 1942 decision which upheld the payment of public funds to sectarian schools for the transportation of their pupils in buses owned by the sectarian schools. *Adams* v. *County Commissioners of St. Mary's County*, 180 Md. 550; 26 A. (2d) 377 (Md. 1942). This decision supports the contention of the dissenting judges in New Jersey in the instant case, below, when they disapproved the "child benefit" theory in these words:

> We quickly perceive that it applies not merely to transportation costs but to the potential costs of the many and varied items entering into modern education. There is no logical stopping point. Related items, already in the public school system, in addition to the vast field having to do with the actual imparting of

* The later Kentucky case (*Nichols* v. *Henry*, 191 S. W. 2d 930) was based on the qualified and restricted statute before it and expressly reaffirmed the earlier case denying the validity of the earlier statute which was in general terms and not qualified.

knowledge, are the installation and maintenance of cafeterias, the preservation and promotion of the health of pupils, the employment of medical inspectors and nurses, the keeping of records of development and growth, and the supervision of athletic activities and bodily exercise. I am unable to distinguish between the logic of using public funds for one as against another of the several parts of the system pursued by the public schools..... Every step in the educational process is, presumably, for the benefit of the child.... Consequently, if the argument is sound, it is within the discretion of the legislature, free of constitutional restraint, to provide for practically the entire cost of education in private and parochial as well as in public schools. 44 A (2d) 333, 339.

Amicus Curiae recognizes that these statutes and court decisions from other jurisdictions are not controlling in the instant case. The review has been submitted to acquaint the Court with the scope of the transportation issue and the prevailing view of the state courts as to the legality of transporting sectarian-school pupils at public expense. As we view the matter, the transportation of sectarian-school pupils has been held invalid in Delaware, Oklahoma, South Dakota, Washington, Wisconsin, while it has been unqualifiedly approved judicially in Maryland only outside of the instant case and by constitutional amendment in New York.

USE OF TAX REVENUES FOR SECTARIAN PURPOSES.

The facts of the *New Jersey* case differ from the facts in most of the other pupil-transportation cases. New Jersey amended its transportation law in 1941 to permit transportation to any school except one operated for profit, provided new routes were not established for the purpose. New Jersey Statutes Annotated, 1940, *supra*. Appellees passed a resolution appropriating money to pay parents the transportation costs they had expended in sending their children to school by common carrier. The appropriation was a total

amount computed on the basis of the number of school days attended. No distinction was made between public and private-school attendance. In so doing Appellees caused public moneys to be passed from the public treasury to the hands of some of its residents, for a sectarian purpose. These funds had been collected by taxes imposed upon the citizens of the state. The New Jersey Constitution prohibits the use of tax revenues for sectarian purposes.

> . . . nor shall any person be obliged to pay tithes, taxes or other rates for building or repairing any church or churches, places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately and voluntarily engaged to perform. New Jersey Constitution, Art. 1, sec. 3.

Thus, Appellees violated this section of the State Constitution in addition to Art. 4, sec. 7, par. 6 which provides that the state school fund shall be used only for public-school purposes. Ignoring Art. 1, sec. 3, the majority of the New Jersey Court reasoned that there was no restriction in Art. 4, sec. 7, par. 6 on any school money except the perpetual fund, and that other state school money or local funds could be used without constitutional restrictions. Examination of the constitutional history of Art. 4, sec. 7, par. 6 will throw light on this reasoning.

The first Constitution of New Jersey was adopted in 1776. The Constitution of 1776 remained in force until superseded by the Constitution of 1844. In the Constitution of 1844 the public-school system of the State of New Jersey was created. Considerable discussion among the delegates turned upon whether education should be established by constitutional provision or be omitted from the constitution and left to the discretion of legislators. Some support for education had been given previously by legislative enactment, but in general a state system of public schools was a novel idea which some of the convention delegates believed was experimental. Some delegates were of

the opinion that, should support for the state public school system be written into the constitution, the school funds should be restricted to the support of public schools in order to prevent conflict among religious sects who might vie with each other to obtain a part of the school fund for the support of their sectarian schools. A committee of five was appointed on the subject of education, and this committee reported the section on education as follows:

> The fund for the support of free schools, and all money, stock, and other property which may hereafter be appropriated for that purpose, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of *public schools*, for the benefit of all people throughout the state; and it shall not be competent for the legislature to borrow, appropriate, or use the same, or any part thereof, for any other purpose, under any pretence whatever. Proceedings, New Jersey Constitutional Convention, 1844, pp. 400, 550 [Italics added].

Mr. Edsall moved further to amend the same by inserting before the word "benefit" the word "equal", stating that this was for the purpose of preventing all sectarian combinations from interfering to divert the true intention of the fund. (Proceedings p. 567.) This amendment was agreed to, and the section was adopted in the Constitution of 1844, and remained in force without amendment until 1875, when it was amended as follows:

> Insert the word "free" between the word "public" and the word "schools," and add to the paragraph the following:
>
> > The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years. Laws 1875, p. 72; Laws 1876, p. 433.

It is contended by *Amicus Curiae* that the delegates to the Constitutional Convention of 1844 and the legislators in 1875 intended the school fund to be a perpetual fund the income of which should be used only for the support of public schools.

Furthermore, during this era there was widespread acceptance of the principle that public-school moneys should not be used for aid to sectarian schools. In 1875, the New Jersey legislators could not have been unaware and unaffected by the fact that other states were also in constitutional conventions at about the same time. Prohibitions regarding the use of public funds for sectarian institutions were adopted by Pennsylvania in its Constitution of 1873 (Art. III, sec. 17; Art. X, sec. 2); in the Arkansas Constitution of 1874 (Art. XIV, sec. 2); in the Nebraska Constitution of 1875 (Art. VII, sec. 11); by Colorado in the Constitution of 1876 (Art. V, sec. 34), and by Texas in its Constitution of 1876 (Art. I, sec. 7; Art. VII, sec. 5). Some states had previously incorporated a similar provision. Others did later. Today all states so provide except Maine and North Carolina. The principle is well established and rarely is attempt made to secure a direct appropriation for a sectarian institution. Transportation aid is one of the indirect methods.

NO ANALOGY BETWEEN INSTANT CASE AND PRECEDENT IN TEXTBOOK CASE.

In 1930 this Court approved a decision in the Louisiana court upholding the distribution of free textbooks to sectarian-school pupils. *Cochran* v. *Louisiana State Board of Education*, 168 La. 973, 123 So. 664 (La. 1929); *affirmed* 281 U. S. 370 (1930). The Louisiana court in this and a companion case devised what has become known as the "child benefit" theory. *Bordon* v. *Louisiana State Board of Education*, 168 La. 1005, 123 So. 655 (La. 1929). The Louisiana decision appears to have been based on several factors, each of which may be differentiated from the instant case. The Louisiana law provided for free textbooks for the school

children of the state. The law did not provide for the purchase of books for sectarian schools as such. The New Jersey transportation law does provide explicitly for transportation of pupils to sectarian schools. The Louisiana law was said to be enacted for the benefit of the children of the state and the "resulting benefits to the state"; the children of the state, not the schools, were said to be the beneficiaries of the statute. The New Jersey law benefits the children of that state also, but as was pointed out by the dissenting judges in the instant case below, all educational opportunity benefits the children exposed to it and results in benefits to the state. However, transporting children to a sectarian school benefits the school more directly than the distribution of free textbooks to sectarian-school pupils, since the school can obtain textbooks with its own funds, once the children are enrolled in the sectarian school; whereas, if the children were not publicly transported to sectarian schools, parents would be obliged to bear the cost of taking their children if they wished them to attend such a school. Therefore transportation of children to sectarian schools at public expense augments the enrollment and attendance at such schools and constitutes an indirect aid to the sectarian schools since it puts the children in the schools to be exposed to sectarian education.

EFFECT OF THE COURT'S DECISION.

If the Court should express the opinion that the transportation of sectarian-school pupils at public expense is an invalid use of public funds since it is an aid to sectarian schools and thus violates the basic American principle of the separation of the church and state, the decision would deter the enactment of similar legislation in other states.

At the same time, it may be pointed out that a decision against Appellees in the instant case, regardless of the scope of the Court's opinion, would not interfere with other relations between sectarian schools and the state; e.g., their exemption from taxation. Most state constitutions specific-

ally exempt from taxation all educational property, or empower the legislature to make such exemption. The policy has been upheld as an encouragement "necessary to the advancement of civilization, and the promotion of the welfare of society." *People* v. *Barber and Miller*, 42 Hun. 27 (N. Y. 1886).

Nor would a decision against Appellees interfere with whatever incidental aid sectarian schools may receive by the incorporation laws of the several states, since merely incorporating a denominational group is not considered state aid of such a tangible nature as to constitute violation of constitutional provisions regarding the separation of church and state. *Terrett* v. *Taylor*, 13 U. S. (9 Cranch) 42 (U. S. 1815); *Bradfield* v. *Roberts*, 175 U. S. 291 (1899).

On the other hand, a decision in favor of Appellees would have far-reaching effects. States now permitting transportation of sectarian-school pupils at public expense would be encouraged to provide other services to children attending sectarian schools. States which do not now furnish transportation of sectarian-school pupils would see the way to justify a move in that direction. Eventually, the country would develop two school systems, one so-called public, the other sectarian, but publicly supported. That result could not fail to weaken our public school system, and the weakening of our public school system would unquestionably curtail the vast flow of strength which it has brought to our nation's progress.

It is with this thought in mind that *Amicus Curiae* asks the Court to weigh carefully all the ramifications of the instant case and decide the issue, not for today only, but with a long range view of the possible effects of its decision in years to come.

Respectfully submitted,

STATE COUNCIL OF THE JUNIOR ORDER OF UNITED AMERICAN MECHANICS OF THE STATE OF NEW JERSEY,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946.

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BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL., *Appellees*.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

PETITION FOR REHEARING.

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SUBJECT INDEX.

	Page
I. (The Facts to which, as Petitioner Contends, the Principles Announced by the Court, are to be Applied)	2
II. (Precedents in this Court on the Subject)	8
III. (Summary of Points)	14

TABLE OF CASES CITED.

Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548	4, 5
Bartels v. Iowa, 262 U. S. 404	10
Board of Education v. Barnette, 319 U. S. 624	5
Bradfield v. Roberts, 175 U. S. 291	10, 11
Busey v. District of Columbia, 138 F. 2d 595	15
Coppage v. Kansas, 236 U. S. 1, 19	8, 12
Davis v. Beason, 133 U. S. 333	12
Interstate Railway Co. v. Massachusetts, 207 U. S. 79	9
Jamison v. Texas, 318 U. S. 413	5
Jenkins v. Andover, 103 Mass. 74	9
King Mfg. Co. v. Augusta, 277 U. S. 100	5
Minersville District v. Gobitis, 310 U. S. 586	6
Panhandle Co. v. State Highway, Com., 294 U. S. 613	13
Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 413	13
Quick Bear v. Leupp, 210 U. S. 50	11
Reynolds v. United States, 98 U. S. 145	12
Reinman v. Little Rock, 237 U. S. 171	4, 5
Southern Ry. Co. v. Virginia, 290 U. S. 190	12
United States v. Carolene Products Co., 304 U. S. 144	15

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946.

NO. 52.

ARCH R. EVERSON, *Appellant*,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL., *Appellees*.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

PETITION FOR REHEARING.

On behalf of Appellant, Arch R. Everson, we respectfully petition the Court to reconsider the application of the principles announced by the majority in interpreting the First Amendment, to the exact facts, and particularly the precise wording of the Resolution, which is the definitive act of the State of New Jersey drawn in question in this case.

I.

The resolution of the Board of Education in this case is set forth in the record and in the briefs. This was the resolution under which the payment of fares to the parents of children attending certain schools in an adjoining school district was authorized and made. The resolution distinctly and unequivocally provided that the Board should bear the expense of the transportation of children to certain "Catholic schools"—so named and designated in the resolution. Here is the record:

(Page 7) "To the Honorable the Justices of the Supreme Court of Judicature of New Jersey:

"I, C. G. LATHAM, District Clerk of the Board of Education of the Township of Ewing, in the County of Mercer, in obedience to the command of the writ hereto annexed, directed to the said The Board of Education of the Township of Ewing, in the County of Mercer, do hereby certify and send to you, the said Justices, the proceedings, records, and papers dealing with the certain action of said Board of Education of the Township of Ewing, in the County of Mercer, in agreeing to pay the cost of transportation of certain pupils from said Township to St. Mary's Cathedral High School, St. Hedwigs Parochial School, St. Francis School, and Trenton Catholic Boys High School, at a cost of $859.80, for the school year 1942-1943, and in paying a portion thereof and agreeing to pay the remainder thereof." • • •

(Page 8) "I, C. G. LATHAM, District Clerk of the Board of Education of the Township of Ewing, in the County of Mercer, do hereby certify that at a regular meeting of The Board of Education of the Township of Ewing, in the County of Mercer, on September 21, 1942, the following action was taken in accordance with the minutes of said meeting:

"'The Transportation Commtt. recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic Schools, by way of public carrier as in recent years. On motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted.'" • • •

(Page 13) "Q. Do you have a record of any payments made to parents to reimburse them for the cost of transportation of pupils from the Township of Ewing to parochial schools in the city of Trenton?

A. I do.

Q. When were those payments made?

A. They were made the first five months and second five months' period. They are made about February, after January's attendance comes in. It is somewhere around the middle of February, or the 15th, when they go out.

Q. Will you, please, refer to your records and tell me whether you have a record of pupils from the Township of Ewing attending St. Hedwig's parochial school in the City of Trenton?

A. I do.

Q. Will you, please, give us a list of the payments made for transportation of such pupils from Ewing Township to that school, giving the name of the parent, the name of the pupil and the amount?" • • •

(Page 14) "Q. Will you, please, refer to your records again and tell me whether you have a record of payments made to parents to reimburse them for cost of transportation of their children from the Township to the Catholic Boys' High School in the City of Trenton?

A. Yes, I have that record." • • • •

(Page 18) "Q. Can you refer to your minutes and tell us when they were authorized?

A. The minutes show on Monday, February 15, 1943, the *Board authorized the payment of a transportation bill* for the first half of high school and elementary at Trenton, to the amount of $8,034.95.

Q. Did that sum of $8,034.95 include the payment to the people whose names you read off and the amounts?

A. Yes, it did." • • •

(Page 20) "Q. How are they reimbursed for that cost of transportation?

A. By *report of the high school* on their monthly attendance, which I check on the back of these cards and at the end of five months it is added up and they are paid according to what it costs, 22 cents a day or 20." • • •

(Page 23) "Q. Are Catholic Boys high school and St. Mary's Cathedral high school, St. Francis school, St. Hedwig's parochial school all Roman Catholic parochial schools in the City of Trenton?

A. They are.

Q. Father Endebrock, are you familiar with the curricula in those schools?

A. Yes.

Q. Is religion taught as part of the curricula?

A. Yes, it is.

Q. In each one of the schools that I mentioned?

A. Yes." • • •

(Page 51) From the decision of the New Jersey Court of Errors and Appeals:

"We conclude that there is nothing on the face of the resolution or statute or in the record before us showing that either the statute or the *resolution enacted thereunder* is unconstitutional or does violence to the Constitution for any of the reasons urged." (Italics supplied)

This particular action of the School Board (and not some general plan for transportation of children) is the precise matter which is brought to the attention of the Court on this appeal, and no other or different action. This resolution (as well as the act of the local school board) was sustained by the highest court of the state as being within the laws of the state and not contrary to the constitution of that state or of the United States.

That such a resolution of local authorities, so upheld by the highest state court, is itself a *law of the state*, the validity of which may be challenged on appeal to this Court on the ground of its being repugnant to the Constitution of the United States is well settled in the decisions of this Court. *Reinman* v. *Little Rock*, 237 U. S. 171; *Atlantic Coast Line R. Co.* v. *Goldsboro*, 232 U. S. 548. Those cases hold that a municipal ordinance is to be regarded as in effect a statute of the state, adopted under a power granted by the state legislature; and hence it is an act of the state within

the Fourteenth Amendment.[1] And like effect was given to a resolution of a School Board in *Board of Education* v. *Barnette*, 319 U. S. 624 and other recent cases.[2]

If it be assumed, for the purposes of this argument only, that it would be within the power of the state or the local

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[1] In *Reinman* v. *Little Rock*, 237 U. S. 171, it is said:

> "The decision of the state court of last resort is conclusive upon the point that the ordinance under consideration is within the scope of the powers conferred by the state legislature upon the city council of Little Rock. It must therefore be treated, for the purposes of our jurisdiction, as an act of legislation proceeding from the law-making power of the State; for a municipal ordinance passed under authority delegated by the legislature is a state law within the meaning of the Federal Constitution; and any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State within the meaning of Judicial Code, sec. 237, which confers jurisdiction upon this court."

In *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, it is said:

> "We must, therefore, treat the ordinances as legislation enacted by virtue of the law-making power of the State. They are manifestly an exertion of the police power, and the question is whether, viewed in that light, they run counter to the 'contract' or 'due process' clauses."

See also *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, where the ruling in the above cases is expressly approved; and also *Jamison* v. *Texas*, 318 U. S. 413, 414, where the ruling is shown to be now firmly established.

[2] In the opinion in *Board of Education* v. *Barnette*, 319 U. S. 624, there is shown the precise act of the State which was the subject of the Court's decision. At page 625 it is said:

> "The West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State 'for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government.' Appellant Board of Education was directed, with advice of the State Superintendent of Schools, to 'prescribe the courses of study covering these subjects' for public schools. The Act made it the duty of private, parochial and denominational schools to prescribe courses of study 'similar to those required for the public schools'."

authorities to provide a broad general plan for the relief or protection of children on the public highways, or of school children necessarily using such highways—that is not the case here presented.

The *resolution* which was before the Court is also set forth:

> "The Board of Education on January 9, 1942, adopted a resolution * * * ordering that the salute to the flag become 'a regular part of the program of activities in the public schools.' that all teachers and pupils 'shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly'."

In the majority opinion of the Court it is said:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."

In *Minersville District* v. *Gobitis*, 310 U. S. 586, the precise matter before the Court is also set forth. At pages 587 and 589 there are summarized the contentions of the parties: "The resolution of the School Board requiring pupils to salute the flag was lawfully adopted, and the expulsion of the children was within its power and authority." * * *

> "The rule compelling respondents to participate in the ceremony of saluting the flag and the act of the School Board in expelling them because they refrain, violate their rights guaranteed by Art. 1, Sec. 3, of the Constitution of Pennsylvania and the Fourteenth Amendment of the Constitution of the United States."

In the opinion, p. 591, it is said:

> "Lillian Gobitis, aged twelve, and her brother William, aged ten, were expelled from the public schools of Minersville, Pennsylvania, for refusing to salute the national flag as part of a daily school exercise. The *local Board of Education* required both teachers and pupils to participate in this ceremony."

The *Gobitis case* was overruled on the merits (the constitutional question) but in both cases the action, upon which the decision of validity or invalidity turned, was the resolution of the School Board—in one case the State School Board and in the other case the local School Board.

The confinement of the issue to the precise case presented is important, not because there is or is not raised the question of discrimination or a violation of the equal protection clause of the Constitution, but because—regardless of the view as to the person or object really benefited—the resolution makes plain that the financial benefit here conferred is directed and given to adherents of a particular religion—the Catholic religion, so named and designated.

Whether this is a "public purpose" need not be argued. The First Amendment to the Constitution, now made applicable to the states by the Fourteenth Amendment, has answered this question by saying that it shall *not* be a public purpose—a purpose as to which the public may concern itself—to make a grant in aid of a particular church as such, or to those professing a particular religious belief as such. Such *aid* is forbidden by the Amendment just as much as a similar *restriction* would be forbidden. This is the minimum requirement of the First Amendment.[3]

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[3] In the majority opinion in this case it is said:

"The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendmen. to the states by the Fourteenth. The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause." • • •

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." • • •

"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." • • •

II.

If, as this Court has said in interpreting the First Amendment, the "establishment of religion" part of the Amendment is to be given equally broad meaning as the part relating to the free exercise of religion, and both are intended to provide the same protection as that in the Virginia statute, then financial aid from taxpayers' money is on an equal footing with "restriction" on the exercise of religious beliefs.[4] The aid extended by the payment of money to parents sending their children to schools of the particular sect of religion cannot be denominated "public welfare" with which the public may properly concern itself, for the Amendment, as now interpreted by the members of the Court, the majority as well as the minority, makes religious belief and the contributions of money for the propagation of religious opinions, a matter entirely of private concern and without the domain of public affairs.

Of a similar situation this Court has said (referring to a "restriction" which we have said is not to be distinguished in principle from "aid") "the mere restriction of liberty or of property rights, cannot of itself be dominated 'public welfare' and treated as a legitimate object of the police power; *for such restriction is the very thing that is inhibited by the Amendment.*" (*Coppage* v. *Kansas*, 236 U. S. 1, 13).

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[4] In the majority opinion in this case, at p. 11, it is said:

> "This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."

The preamble to the Virginia Statute provided:

> "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical;" • • •

Here again we must refer to the Resolution which is before the Court; "the transportation of pupils of Ewing to the * * * Trenton Catholic Schools."

There is no precedent in this Court, in any of the decisions on the subject heretofore rendered, for so treating, as "public welfare," aid to religious organizations or to persons adhering to religious organizations.

Of course, education in general is a matter of public concern and the states have given it concern, providing for it in many ways, by building schools, both elementary and high schools, employing teachers and paying their salaries from public funds, furnishing transportation to and from schools, furnishing recreational and physical culture facilities, classroom apparatus, school books, etc. And no one has denied the constitutionality of such acts, as Mr. Justice Holmes has said in *Interstate Ry.* v. *Massachusetts*, 207 U. S. 79, though with his usual caution he very carefully refers to *public schools* only.[5] But if this public concern and the use of pub-

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[5] In *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79, the question before the Court was stated as follows:

> "This was a complaint against the plaintiff in error for refusing to sell tickets for the transportation of pupils to and from the public schools at one-half the regular fare charged by it, as required by Mass. Rev. Laws, c. 112, sec. 72."

Mr. Justice Holmes in his opinion said:

> "And, to return to the taking of property, the aspect in which I am considering the case, general taxation to maintain public schools is an appropriation of property to a use in which the taxpayer may have no private interest, and, it may be, against his will. It has been condemned by some theorists on that ground. Yet no one denies its constitutionality. People are accustomed to it and accept it without doubt. The present requirement is not different in fundamental principle, although the tax is paid in kind and falls only on the class capable of paying that kind of tax—a class of *quasi* public corporations specially subject to legislative control." * * *

This language must be taken in connection with the definition of "public schools" in the decisions in Massachusetts, for example in *Jenkins* v. *Andover*, 103 Mass. 74, as: "Schools which towns are required to maintain, or authorized to maintain, though not required to do so, as a part of our system of common education and

lic funds are to be extended to Catholic schools or to Baptist schools, for example, or (which is in logic the same thing) to the children because they attend Catholic schools or Baptist schools, then logically, assuming the premises we have given, this aid cannot be limited to furnishing transportation.

Certainly no support is given to such application of the "general welfare" doctrine by the case of *Bradfield* v. *Roberts*, 175 U. S. 291. In that case the opinion of the Court was wholly based upon the proposition that the hospital there used for which compensation was granted by Congress was a private corporation and not a religious organization, the Court saying that the affiliations of the particular stockholders who from time to time might own the stock in that corporation would not change its character.

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which are open and free to all the children and youth of the towns in which they are situated, who are of proper age or qualifications to attend them, or which adjoining towns may unite to support as a part of the same system; * * *

> "This class of school does not include private schools which are supported and managed by individuals; nor colleges or academies organized and maintained under special charters for promoting the higher branches of learning, and not specially intended for, nor limited to, the inhabitants of a particular locality."

If, as is everywhere conceded (and stated by the majority in the instant case) it is a valid, constitutional exercise of power to confine the transportation of school children to those attending *public schools*, such action does not at the same time become unconstitutional because, being confined to public schools, it excludes private schools, religious or otherwise.

Indeed, if this were a "restriction" instead of a "benefit" it might well be said that what was clearly in the interest of "public welfare" and constitutional as to children in public schools might well be unconstitutional, (though the general purpose be the same) if extended expressly to private and parochial schools. See *Bartels* v. *Iowa*, 262 U. S. 404, at p. 413, last sentence of opinion by Mr. Justice Holmes: "I agree with the Court [holding the law unconstitutional] as to the special proviso against the German language contained in the statute dealt with in *Bohning* v. *Ohio*." The special proviso referred to, read as follows: "provided that the German language shall not be taught below the eighth grade in any such schools [private and parochial schools] within this state."

The very emphasis on the non-religious character of the institution leads inevitably to the conclusion that had the fact been otherwise the decision likewise would have been different. The inference is plain that no theory of general welfare would have justified a grant to a religious organization.[6]

So of the case *Quick Bear* v. *Leupp*, 210 U. S. 50. In that case the sole question before the Court was whether the funds granted were public monies of the United States or monies of the Indians. The Court held that the funds involved were not public funds in the sense in which those words are understood, that is, as meaning public funds for the general use of the state and for the exercise by the government of its Police Power. This being the basis of the opinion, it clearly negatives any thought that a grant of public funds to Catholic Indian Missions would be valid.[7]

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[6] From the opinion in *Bradfield* v. *Roberts*, 175 U. S. 291, at 297:

"If we were to assume, for the purpose of this question only, that under this appropriation an agreement with a religious corporation of the tenor of this agreement would be invalid, as resulting indirectly in the passage of an act respecting an establishment of religion, we are unable to see that the complainant in his bill shows that the corporation is of the kind described, but on the contrary he has clearly shown that it is not."

[7] From the opinion in *Quick Bear* v. *Leupp*, 210 U. S. 50, at 81:

"But it is contended that the spirit of the Constitution requires that the declaration of policy that the Government 'shall make no appropriation whatever for education in any sectarian schools, should be treated as applicable, on the ground that the actions of the United States were to always be undenominational, and that, therefore, the Government can never act in a sectarian capacity, either in the use of its own funds or in that of the funds of others, in respect of which it is a trustee; hence that even the Sioux trust fund cannot be applied for education in Catholic schools, even though the owners of the fund so desire it. But we cannot concede the proposition that Indians cannot be allowed to use *their own money* to educate their children in the schools of their own choice because the Government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibit the free exercise thereof."

These are the two cases in this Court cited as authority on the question by counsel for the Appellee and they are also cited in the majority opinion. It is not apparent that any of the other cases in this Court cited in the majority opinion lends any support to either side on the particular point we are now discussing.[8]

"General welfare" is part of the "Police Power." The Police Power is broad and being inherent in Government it is aside from the constitutional grant of power to the legislature. But it is not *above* the Constitution; it is subordinate to the Constitution. The limitations in the Constitution are restrictions on the exercise of the Police Power. The very purpose of the First and Fourteenth Amendments was to restrain the Government, State or Federal, in the exercise of sovereignty under the guise of the Police Power. (*Southern Ry. Co.* v. *Virginia*, 290 U. S. 190).[9] If this were not true they would be useless.

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[8] The cases of *Reynolds* v. *United States*, 98 U.S. 145, and *Davis* v. *Beason*, 133 U. S. 333, have no real bearing on the point under consideration. They hold merely that "a crime is none the less so, nor less odious, because sanctioned by what any particular sect may designate as religion."

[9] In *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190, at p. 196, it is said:

> "The claim that the questioned statute was enacted under the police power of the State and, therefore, is not subject to the standards applicable to legislation under other powers, conflicts with the firmly established rule that every state power is limited by the inhibitions of the XIV Amendment."

See also *Coppage* v. *Kansas*, 236 U. S. 1, 17, 19, where it is said:

> "'And since a State may not strike them [rights under the Fourteenth Amendment] down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty."

If, as the majority opinion states with reference to the Church, the State must be neutral and cannot become an adversary, by like token it must not commingle the affairs of government with the affairs of the Church as such or of the adherents of a particular sect of the Church as such. This historically is the true meaning of "separation of Church and State" as embodied in the First Amendment as that Amendment is interpreted by the majority of this Court.

"The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare' and treated as a legitimate object of the police power, for such restriction is the very thing that is inhibited by the amendment."

While the authority of the *Coppage case* as applied to problems growing out of national labor relations acts has been denied in recent cases, the cogent reasoning of Mr. Justice Pitney as to the scope of the Police Power remains sound. See *Panhandle Co.* v. *State Highway Com.*, 294 U. S. 613, where it is said:

"A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions. * * * The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the State to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire." And see also language of Mr. Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 413: "But obviously the implied limitation [Police Power] must have its limits, or the contract and due process clauses are gone."

The same thought has been aptly expressed by Mr. Justice Stone (see dissenting opinion in the *Gobitis case*, 310 U. S. 586, 604) whose views on the subject then under discussion afterwards prevailed in the *Barnette case*, 319 U. S. 624: "History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, * * * The framers were not unaware that under the system which they created most governmental curtailments of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection."

III.

We therefore respectfully urge two points as grounds for reconsideration: *First:* That on the very principles announced by the majority of the Court as those to be applied in securing the absolute "separation of Church and State" implicit in the First Amendment as now interpreted by this Court, an act of the state (whatever its form—law or ordinance or resolution under law) which does specifically refer to and segregate the church or some sect of religion or the adherents to some sect of religion, as recipients of its grant, should be struck down because it commingles the affairs of the State and the affairs of a particular religious belief.

And, as subsidiary to this: That the resolution of the School Board which does thus commingle the affairs of the State and Church—the public schools and the Catholic schools—by particularly providing for transportation to the Catholic schools *is* the act of the state before this Court, challenged on this appeal.

Second: That the act of the state (resolution of the School Board in this instance, held by the state court to be authorized by state law) should not be sustained on the ground that a more general resolution not referring to nor segregating any particular sect of religion or any religion at all—such as police protection, fire protection, transportation of children generally, etc.—might be upheld as an exercise of the Police Power to secure the "general welfare."

And, as subsidiary to this: That, a resolution of the School Board with its direct and exclusive reference to "Catholic Schools" in securing payments for transportation, being before the Court, it is not necessary in order to determine its constitutional validity under the First Amendment to find that there is or is not evidence to show circumstances and conditions which might have called for a different and broader resolution or for one that did not

name a particular sect of religion and its adherents, as the beneficiaries of its grant.[10]

WHEREFORE, Appellant, by his counsel, prays that this Petition for Rehearing be granted and that the mandate herein be not issued until this Court has the opportunity to consider and act upon this Petition.

Respectfully submitted,

EDWARD R. BURKE,
CHALLEN B. ELLIS,
W. D. JAMIESON,
KAHL K. SPRIGGS,
Counsel for Appellant-Petitioner.

E. HILTON JACKSON,
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Of Counsel.

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[10] See *Busey* v. *District of Columbia*, 138 F. 2d 595, based on *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, and recent decisions of this Court under the First Amendment, and applying the mandate of this Court (319 U. S. 579): "We think we may now hold that when legislation *appears on its face to affect the use of speech, press, or religion*, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed; * * * The burden of proof in such a case should be upon those who deny that these freedoms are invaded."

CERTIFICATE.

The undersigned counsel for Appellant certifies that the within Petition for Rehearing is filed in good faith and not for delay.

CHALLEN B. ELLIS,
Of Counsel for Appellant-Petitioner.

Black pp. 7, 14
Rutledge pp. 2, 6, 26, 27, 28

SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1946.

Arch R. Everson, Appellant, v. Board of Education of the Township of Ewing, et al.	Appeal from the Court of Errors and Appeals of the State of New Jersey.

[February 10, 1947.]

Mr. Justice Black delivered the opinion of the Court.

A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation of children to and from schools.[1] The appellee, a township board of education, acting pursuant to this statute authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. These church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith. The superintendent of these schools is a Catholic priest.

[1] "Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part." New Jersey Laws, 1941, c. 191, p. 581; N. J. Rev. Stat. 18: 14–8.

The appellant, in his capacity as a district taxpayer, filed suit in a State court challenging the right of the Board to reimburse parents of parochial school students. He contended that the statute and the resolution passed pursuant to it violated both the State and the Federal Constitutions. That court held that the legislature was without power to authorize such payment under the State constitution. 132 N. J. L. 98. The New Jersey Court of Errors and Appeals reversed, holding that neither the statute nor the resolution passed pursuant to it was in conflict with the State constitution or the provisions of the Federal Constitution in issue. 133 N. J. L. 350. The case is here on appeal under 28 U. S. C. § 344 (a).

Since there has been no attack on the statute on the ground that a part of its language excludes children attending private schools operated for profit from enjoying State payment for their transportation, we need not consider this exclusionary language; it has no relevancy to any constitutional question here presented.[3] Furthermore, if the exclusion clause had been properly challenged, we do not know whether New Jersey's highest court would con-

[3] Appellant does not challenge the New Jersey statute or the resolution on the ground that either violates the equal protection clause of the Fourteenth Amendment by excluding payment for the transportation of any pupil who attends a "private school run for profit." Although the township resolution authorized reimbursement only for parents of public and Catholic school pupils, appellant does not allege, nor is there anything in the record which would offer the slightest support to an allegation, that there were any children in the township who attended or would have attended, but for want of transportation, any but public and Catholic schools. It will be appropriate to consider the exclusion of students of private schools operated for profit when and if it is proved to have occurred, is made the basis of a suit by one in a position to challenge it, and New Jersey's highest court has ruled adversely to the challenger. Striking down a state law is not a matter of such light moment that it should be done by a federal court *ex mero motu* on a postulate neither charged nor proved, but which rests on nothing but a possibility. *Cf. Liverpool N. Y. & P. Steamship Co.* v. *Comm'rs. of Emigration*, 113 U. S. 33, 39.

strue its statutes as precluding payment of the school transportation of any group of pupils, even those of a private school run for profit.[3] Consequently, we put to one side the question as to the validity of the statute against the claim that it does not authorize payment for the transportation generally of school children in New Jersey.

The only contention here is that the State statute and the resolution, insofar as they authorized reimbursement to parents of children attending parochial schools, violate the Federal Constitution in these two respects, which to some extent, overlap. *First.* They authorize the State to take by taxation the private property of some and bestow it upon others, to be used for their own private purposes. This, it is alleged, violates the due process clause of the Fourteenth Amendment. *Second.* The statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of State power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states.

First. The due process argument that the State law taxes some people to help others carry out their private

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[3] It might hold the excepting clause to be invalid, and sustain the statute with that clause excised. Section 1:10 N. J. Rev. Stat. provides with regard to any statute that if "any provision thereof shall be declared unconstitutional . . . in whole or in part, by a court of competent jurisdiction, such article shall, to the extent it is not unconstitutional, . . . be enforced . . . ." The opinion of the Court of Errors and Appeals in this very case suggests that state law now authorizes transportation of *all* pupils. Its opinion stated: "Since we hold that the legislature may appropriate general state funds or authorize the use of local funds for the transportation of pupils to *any* school, we conclude that such authorization of the use of local funds is likewise authorized by *Pamph. L.* 1941, *Ch.* 191, and *R. S.* 18:7–78." 133 N. J. L. 350, 354. (Italics supplied.)

purposes is framed in two phases. The first phase is that a state cannot tax A to reimburse B for the cost of transporting his children to church schools. This is said to violate the due process clause because the children are sent to these church schools to satisfy the personal desires of their parents, rather than the public's interest in the general education of all children. This argument, if valid, would apply equally to prohibit state payment for the transportation of children to any non-public school, whether operated by a church, or any other non-government individual or group. But, the New Jersey legislature has decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, including those who attend parochial schools. The New Jersey Court of Errors and Appeals has reached the same conclusion. The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need.

It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one. *Loan Association* v. *Topeka*, 20 Wall. 655; *Parkersburg* v. *Brown*, 106 U. S. 487; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55. But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution. *Green* v. *Frazier*, 253 U. S. 233, 240. Otherwise, a state's power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states. Changing local conditions create new local problems which may lead a state's people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people. The Fourteenth Amendment did not strip the states of their power to meet problems previously left

for individual solution. *Davidson* v. *New Orleans*, 96 U. S. 97, 103–104; *Barbier* v. *Connolly*, 113 U. S. 27, 31–32; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 157–158.

It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370; Holmes, J., in *Interstate Ry.* v. *Massachusetts*, 207 U. S. 79, 87. See opinion of Cooley, J., in *Stuart* v. *School District No. 1 of Kalamazoo*, 30 Mich. 69 (1878). The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or "hitch-hiking." See *Barbier* v. *Connolly*, *supra* at 31. See also cases collected 63 A. L. R. 413; 118 A. L. R. 806. Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program. See *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 518. Subsidies and loans to individuals such as farmers and home owners, and to privately owned transportation systems, as well as many other kinds of businesses, have been commonplace practices in our state and national history.

Insofar as the second phase of the due process argument may differ from the first, it is by suggesting that taxation for transportation of children to church schools constitutes support of a religion by the State. But if the law is invalid for this reason, it is because it violates the First Amendment's prohibition against the establishment of religion by law. This is the exact question raised by appellant's second contention, to consideration of which we now turn.

Second. The New Jersey statute is challenged as a "law respecting the establishment of religion." The First Amendment, as made applicable to the states by the Fourteenth, *Murdock* v. *Pennsylvania*, 319 U. S. 105, commands that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. Doubtless their goal has not been entirely reached; but so far has the Nation moved toward it that the expression "law respecting the establishment of religion," probably does not so vividly remind present-day Americans of the evils, fears, and political problems that caused that expression to be written into our Bill of Rights. Whether this New Jersey law is one respecting the "establishment of religion" requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. Once again,[4] therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants,

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[4] See *Reynolds* v. *United States*, 98 U. S. 145, 162; *cf. Knowlton* v. *Moore*, 178 U. S. 41, 89, 106.

Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.[5]

These practices of the old world were transplanted to and began to thrive in the soil of the new America. The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which all, whether believers or non-believers, would be required to support and attend.[6] An exercise of

[5] See *e. g.* Macaulay, History of England (1849) I, cc. 2, 4; The Cambridge Modern History (1908) V, cc. V, IX, XI; Beard, Rise of American Civilization (1937) I, 60; Cobb, Religious Liberty in America (1902) c. II; Sweet, The Story of Religion in America (1939) c. II; Sweet, Religion in Colonial America (1942) 320–322.

[6] See *e. g.* the charter of the colony of Carolina which gave the grantees the right of "patronage and ~~avowdsons~~ of all the churches and chapels . . . together with licence and power to build and found churches, chapels and oratories . . . and to cause them to be dedicated and consecrated, according to the ecclesiastical laws of our kingdom of England." Poore, Constitutions (1878) II, 1390, 1391. That of Maryland gave to the grantee Lord Baltimore "the Patronages and ~~Avowdsons~~ of all Churches which . . . shall happen to be built, together with Licence and Faculty of erecting and founding Churches, Chapels, and Places of Worship . . . and of causing the same to be dedicated and consecrated according to the Ecclesiastical Laws of our

this authority was accompanied by a repetition of many of the old world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated.[7] And all of these dissenters were compelled to pay tithes and taxes[8] to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.

These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence.[9]

Kingdom of *England*, with all, and singular such, and as ample Rights, Jurisdictions, Privileges, . . . as any Bishop . . . in our Kingdom of *England* ever . . . hath had. . . ." McDonald, Documentary Source Book of American History (1934) 31, 33. The Commission of New Hampshire of 1680, Poore, *supra*, II, 1277, stated: "And above all things We do by these presents will, require and comand our said Councill to take all possible care for ye discountenancing of vice and encouraging of virtue and good living; and that by such examples ye infidle may be invited and desire to partake of ye Christian Religion, and for ye greater ease and satisfaction of ye sd loving subjects in matters of religion, We do hereby require and comand yt liberty of conscience shall be allowed unto all protestants; yt such especially as shall be conformable to ye rites of ye Church of Engd shall be particularly countenanced and encouraged." See also *Paulett* v. *Clark*, 9 Cranch 292.

[7] See *e. g.* Semple, Baptists in Virginia (1894); Sweet, Religion in Colonial America, *supra* at 131–152, 322–339.

[8] Almost every colony exacted some kind of tax for church support. See *e. g.* Cobb, op. cit. *supra*, *note* 5, 110 (Virginia); 131 (North Carolina); 169 (Massachusetts); 270 (Connecticut); 304, 310, 339 (New York); 386 (Maryland); 295 (New Hampshire).

[9] Madison wrote to a friend in 1774: "That diabolical, hell-conceived principle of persecution rages among some. . . . This vexes me the worst of anything whatever. There are at this time in the adjacent

The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation.[10] It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

The movement toward this end reached its dramatic climax in Virginia in 1785–86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law.[11] In it, he eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed

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country not less than five or six well-meaning men in close jail for publishing their religious sentiments, which in the main are very orthodox. I have neither patience to hear, talk, or think of anything relative to this matter; for I have squabbled and scolded, abused and ridiculed, so long about it to little purpose, that I am without common patience. So I must beg you to pity me, and pray for liberty of conscience to all." I Writings of James Madison (1900) 18, 21.

[10] Virginia's resistance to taxation for church support was crystallized in the famous "Parson's Case" argued by Patrick Henry in 1763. For an account see Cobb, *op. cit., supra*, note 5, 108–111.

[11] II Writings of James Madison, 183.

to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions. Madison's Remonstrance received strong support throughout Virginia,[12] and the Assembly postponed consideration of the proposed tax measure until its next session. When the proposal came up for consideration at that session, it not only died in committee, but the Assembly enacted the famous "Virginia Bill for Religious Liberty" originally written by Thomas Jefferson.[13] The preamble to that Bill stated among other things that

> "Almighty God hath created the mind free; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . .; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the

[12] In a recently discovered collection of Madison's papers, Madison recollected that his Remonstrance "met with the approbation of the Baptists, the Presbyterians, the Quakers, and the few Roman Catholics, universally; of the Methodists in part; and even of not a few of the Sect formerly established by law." Madison, *Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments*, in Fleet, *Madison's "Detached Memorandum,"* 3 William and Mary Q. (1946) 534, 551, 555.

[13] For accounts of background and evolution of the Virginia Bill for Religious Liberty see *e. g.* James, The Struggle for Religious Liberty in Virginia (1900); Thom, The Struggle for Religious Freedom in Virginia; the Baptists (1900); Cobb, *op. cit., supra*, note 5, 74–115; Madison, *Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments, op. cit., supra*, note 12, 554, 556.

particular pastor, whose morals he would make his pattern. . . ."

And the statute itself enacted

"That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . ."[14]

This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute. *Reynolds* v. *United States, supra* at 164; *Watson* v. *Jones*, 13 Wall. 679; *Davis* v. *Beason*, 133 U. S. 333, 342. Prior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states.[15] Most of them did soon provide similar constitutional protections for religious liberty.[16] But some states persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups.[17] In recent years, so far as the provision against the establishment of a religion is concerned,

[14] 12 Hening, Statutes of Virginia (1823) 84; Commager, Documents of American History (1944) 125.

[15] *Permoli* v. *New Orleans*, 3 How. 589. *Cf. Barron* v. *Baltimore*, 7 Pet. 243.

[16] For a collection of state constitutional provisions on freedom of religion see Gavel, Public Funds for Church and Private Schools (1937) 148–149. See also 2 Cooley, Constitutional Limitations (1927) 960–985.

[17] Test provisions forbade office holders to "deny . . . the truth of the Protestant religion," *e. g.* Constitution of North Carolina (1776) § XXXII, II Poore, *supra*, 1413. Maryland permitted taxation for support of the Christian religion and limited civil office to Christians until 1818, *id.*, I, 819, 820, 832.

the question has most frequently arisen in connection with proposed state aid to church schools and efforts to carry on religious teachings in the public schools in accordance with the tenets of a particular sect.[18] Some churches have either sought or accepted state financial support for their schools. Here again the efforts to obtain state aid or acceptance of it have not been limited to any one particular faith.[19] The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religions and governments. Their decisions, however, show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.[20]

The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth.[21] The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom.[22] There is every rea-

[18] See Note 50 Yale L. J. (1941) 917; see also cases collected 14 L. R. A. 418; 5 A. L. R. 879; 141 A. L. R. 1148.

[19] See cases collected 14 L. R. A. 418; 5 A. L. R. 879; 141 A. L. R. 1148.

[20] *Ibid.* See also Cooley, *op. cit., supra*, note 16.

[21] *Terrett* v. *Taylor*, 9 Cranch 43; *Watson* v. *Jones*, 13 Wall 679; *Davis* v. *Beason*, 133 U. S. 333; *Cf. Reynolds* v. *U. S., supra*, 162; *Reuben Quick Bear* v. *Leupp*, 210 U. S. 50.

[22] *Cantwell* v. *Conn.*, 310 U. S. 296; *Jamison* v. *Texas*, 318 U. S. 413; *Largent* v. *Texas*, 318 U. S. 418; *Murdock* v. *Pennsylvania, supra;*

son to give the same application and broad interpretation to the "establishment of religion" clause. The interrelation of these complementary clauses was well summarized in a statement of the Court of Appeals of South Carolina,[22] quoted with approval by this Court in *Watson* v. *Jones*, 13 Wall. 679, 730: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasions of the civil authority."

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." *Reynolds* v. *United States*, *supra* at 164.

West Virginia State Board of Education v. *Barnette*, 319 U. S. 624; *Follett* v. *McCormick*, 321 U. S. 573; *Marsh* v. *Alabama*, 327 U. S. 501. *Cf. Bradfield* v. *Roberts*, 175 U. S. 291.

[22] *Harmon* v. *Dreher*, 2 Speer's Equity Reports (S. C., 1843), 87, 120.

We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that State statute down if it is within the State's constitutional power even though it approaches the verge of that power. See *Interstate Ry.* v. *Massachusetts*, Holmes, J., *supra* at 85, 88. New Jersey cannot consistently with the "establishment of religion clause" of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief.

Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their childrens' bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit com-

pany to provide reduced fares to school children including those attending parochial schools,[24] or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public

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[24] New Jersey long ago permitted public utilities to charge school children reduced rates. See *Public S. R. Co.* v. *Public Utility Comm'rs.* 81 N. J. L. 363 (1911); see also *Interstate Ry.* v. *Mass., supra.* The District of Columbia Code requires that the new charter of the District public transportation company provide a three cent fare "for school children . . . going to and from public, parochial or like schools . . ." 47 Stat. 752, 759.

school if the school meets the secular educational requirements which the state has power to impose. See *Pierce* v. *Society of Sisters*, 268 U. S. 510. It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1946.

Arch R. Everson, Appellant, v. Board of Education of the Township of Ewing, et al.	Appeal from the Court of Errors and Appeals of the State of New Jersey.

[February 10, 1947.]

Mr. Justice Jackson, dissenting.

I find myself, contrary to first impressions, unable to join in this decision. I have a sympathy, though it is not ideological, with Catholic citizens who are compelled by law to pay taxes for public schools, and also feel constrained by conscience and discipline to support other schools for their own children. Such relief to them as this case involves is not in itself a serious burden to taxpayers and I had assumed it to be as little serious in principle. Study of this case convinces me otherwise. The Court's opinion marshals every argument in favor of state aid and puts the case in its most favorable light, but much of its reasoning confirms my conclusions that there are no good grounds upon which to support the present legislation. In fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, "whispering 'I will ne'er consent,'—consented."

I.

The Court sustains this legislation by assuming two deviations from the facts of this particular case; first, it assumes a state of facts the record does not support, and secondly, it refuses to consider facts which are inescapable on the record.

The Court concludes that this "legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools," and it draws a comparison between "state provisions intended to guarantee free transportation" for school children with services such as police and fire protection, and implies that we are here dealing with "laws authorizing new types of public services . . ." This hypothesis permeates the opinion. The facts will not bear that construction.

The Township of Ewing is not furnishing transportation to the children in any form; it is not operating school busses itself or contracting for their operation; and it is not performing any public service of any kind with this taxpayer's money. All school children are left to ride as ordinary paying passengers on the regular busses operated by the public transportation system. What the Township does, and what the taxpayer complains of, is at stated intervals to reimburse parents for the fares paid, provided the children attend either public schools or Catholic Church schools. This expenditure of tax funds has no possible effect on the child's safety or expedition in transit. As passengers on the public busses they travel as fast and no faster, and are as safe and no safer, since their parents are reimbursed as before.

In addition to thus assuming a type of service that does not exist, the Court also insists that we must close our eyes to a discrimination which does exist. The resolution which authorizes disbursement of this taxpayer's money limits reimbursement to those who attend public schools and Catholic schools. That is the way the Act is applied to this taxpayer.

The New Jersey Act in question makes the character of the school, not the needs of the children determine the eligibility of parents to reimbursement. The Act

permits payment for transportation to parochial schools or public schools but prohibits it to private schools operated in whole or in part for profit. Children often are sent to private schools because their parents feel that they require more individual instruction than public schools can provide, or because they are backward or defective and need special attention. If all children of the state were objects of impartial solicitude, no reason is obvious for denying transportation reimbursement to students of this class, for these often are as needy and as worthy as those who go to public or parochial schools. Refusal to reimburse those who attend such schools is understandable only in the light of a purpose to aid the schools, because the state might well abstain from aiding a profit-making private enterprise. Thus, under the Act and resolution brought to us by this case children are classified according to the schools they attend and are to be aided if they attend the public schools or private Catholic schools, and they are not allowed to be aided if they attend private secular schools or private religious schools of other faiths.

Of course, this case is not one of a Baptist or a Jew or an Episcopalian or a pupil of a private school complaining of discrimination. It is one of a taxpayer urging that he is being taxed for an unconstitutional purpose. I think he is entitled to have us consider the Act just as it is written. The statement by the New Jersey court that it holds the Legislature may authorize use of local funds "for the transportation of pupils to any school," 133 N. J. L. 350, 354, in view of the other constitutional views expressed, is not a holding that this Act authorizes transportation of *all* pupils to *all* schools. As applied to this taxpayer by the action he complains of, certainly the Act does not authorize reimbursement to those who choose any alternative to the public school except Catholic Church schools.

If we are to decide this case on the facts before us, our question is simply this: Is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination?

II.

Whether the taxpayer constitutionally can be made to contribute aid to parents of students because of their attendance at parochial schools depends upon the nature of those schools and their relation to the Church. The Constitution says nothing of education. It lays no obligation on the states to provide schools and does not undertake to regulate state systems of education if they see fit to maintain them. But they cannot, through school policy any more than through other means, invade rights secured to citizens by the Constitution of the United States. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624. One of our basic rights is to be free of taxation to support a transgression of the constitutional command that the authorities "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U. S. Const., Amend. I; *Cantwell* v. *Connecticut*, 310 U. S. 296.

The function of the Church school is a subject on which this record is meager. It shows only that the schools are under superintendence of a priest and that "religion is taught as part of the curriculum." But we know that such schools are parochial only in name—they, in fact, represent a world-wide and age-old policy of the Roman Catholic Church. Under the rubric "Catholic Schools," the Canon Law of the Church by which all Catholics are bound, provides:

> "1215. Catholic children are to be educated in schools where not only nothing contrary to Catholic faith and morals is taught, but rather in schools where religious and moral training occupy the first place. . . . (Canon 1372.)"

"1216. In every elementary school the children must, according to their age, be instructed in Christian doctrine.

"The young people who attend the higher schools are to receive a deeper religious knowledge, and the bishops shall appoint priests qualified for such work by their learning and piety. (Canon 1373.)"

"1217. Catholic children shall not attend non-Catholic, indifferent, schools that are mixed, that is to say, schools open to Catholics and non-Catholics alike. The bishop of the diocese only has the right, in harmony with the instructions of the Holy See, to decide under what circumstances, and with what safeguards to prevent loss of faith, it may be tolerated that Catholic children go to such schools. (Canon 1374.)"

"1224. The religious teaching of youth in any schools is subject to the authority and inspection of the Church.

"The local Ordinaries have the right and duty to watch that nothing is taught contrary to faith or good morals, in any of the schools of their territory.

"They, moreover, have the right to approve the books of Christian doctrine and the teachers of religion, and to demand, for the sake of safeguarding religion and morals, the removal of teachers and books. (Canon 1381.)" (Woywod, Rev. Stanislaus, The New Canon Law, under imprimatur of Most Rev. Francis J. Spellman, Archbishop of New York and others, 1940.)

It is no exaggeration to say that the whole historic conflict in temporal policy between the Catholic Church and non-Catholics comes to a focus in their respective school policies. The Roman Catholic Church, counseled by experience in many ages and many lands and with all sorts and conditions of men, takes what, from the viewpoint of its own progress and the success of its mission, is a wise estimate of the importance of education to religion. It does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination

in the faith and order of the Church by the word and example of persons consecrated to the task.

Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. It is a relatively recent development dating from about 1840.[1] It is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer.

I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church. If put to the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education of the young, and it would be a wise choice. Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself.

III.

It is of no importance in this situation whether the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefits to the school. The state cannot maintain a Church and it can no more tax its citizens to furnish free carriage to those who attend a Church. The prohi-

[1] See Cubberley, Public Education in the United States (1934) ch. VI; Knight, Education in the United States (1941) ch. VIII.

bition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination.

The Court, however, compares this to other subsidies and loans to individuals and says, "Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program. See *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 518." Of course, the state may pay out tax-raised funds to relieve pauperism, but it may not under our Constitution do so to induce or reward piety. It may spend funds to secure old age against want, but it may not spend funds to secure religion against skepticism. It may compensate individuals for loss of employment, but it cannot compensate them for adherence to a creed.

It seems to me that the basic fallacy in the Court's reasoning, which accounts for its failure to apply the principles it avows, is in ignoring the essentially religious test by which beneficiaries of this expenditure are selected. A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid "Is this man or building identified with the Catholic Church." But before these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld. To consider the converse of the Court's reasoning will best

disclose its fallacy. That there is no parallel between police and fire protection and this plan of reimbursement is apparent from the incongruity of the limitation of this Act if applied to police and fire service. Could we sustain an Act that said the police shall protect pupils on the way to or from public schools and Catholic schools but not while going to and coming from other schools, and firemen shall extinguish a blaze in public or Catholic school buildings but shall not put out a blaze in Protestant Church schools or private schools operated for profit? That is the true analogy to the case we have before us and I should think it pretty plain that such a scheme would not be valid.

The Court's holding is that this taxpayer has no grievance because the state has decided to make the reimbursement a public purpose and therefore we are bound to regard it as such. I agree that this Court has left, and always should leave to each state, great latitude in deciding for itself, in the light of its own conditions, what shall be public purposes in its scheme of things. It may socialize utilities and economic enterprises and make taxpayers' business out of what conventionally had been private business. It may make public business of individual welfare, health, education, entertainment or security. But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character. There is no answer to the proposition more fully expounded by MR. JUSTICE RUTLEDGE that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious

freedom and which the Court is overlooking today. This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse. Those great ends I cannot but think are immeasurably compromised by today's decision.

This policy of our Federal Constitution has never been wholly pleasing to most religious groups. They all are quick to invoke its protections; they all are irked when they feel its restraints. This Court has gone a long way, if not an unreasonable way, to hold that public business of such paramount importance as maintenance of public order, protection of the privacy of the home, and taxation may not be pursued by a state in a way that even indirectly will interfere with religious proselyting. See dissent in *Douglas* v. *Jeannette*, 319 U. S. 157, 166; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Martin* v. *Struthers*, 319 U. S. 141; *Jones* v. *Opelika*, 316 U. S. 584, reversed on rehearing, 319 U. S. 103.

But we cannot have it both ways. Religious teaching cannot be a private affair when the state seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all. If these principles seem harsh in prohibiting aid to Catholic education, it must not be forgotten that it is the same Constitution that alone assures Catholics the right to maintain these schools at all when predominant local sentiment would forbid them. *Pierce* v. *Society of Sisters*, 268 U. S. 510. Nor should I think that those who have done so well without this aid would want to see this separation between Church

and State broken down. If the state may aid these religious schools, it may therefore regulate them. Many groups have sought aid from tax funds only to find that it carried political controls with it. Indeed this Court has declared that "It is hardly lack of due process for the Government to regulate that which it subsidizes." *Wickard* v. *Filburn*, 317 U. S. 111, 131.

But in any event, the great purposes of the Constitution do not depend on the approval or convenience of those they restrain. I cannot read the history of the struggle to separate political from ecclesiastical affairs, well summarized in the opinion of MR. JUSTICE RUTLEDGE in which I generally concur, without a conviction that the Court today is unconsciously giving the clock's hands a backward turn.

MR. JUSTICE FRANKFURTER joins in this opinion.

SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1946.

Arch R. Everson, Appellant, v. Board of Education of the Township of Ewing, et al. | Appeal from the Court of Errors and Appeals of the State of New Jersey.

[February 10, 1947.]

Mr. Justice Rutledge, with whom Mr. Justice Frankfurter, Mr. Justice Jackson and Mr. Justice Burton agree, dissenting.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U. S. Const., Am. Art. I.

* * *

"Well aware that Almighty God hath created the mind free; . . . that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; . . .

"*We, the General Assembly, do enact,* That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . ."[1]

I cannot believe that the great author of those words, or the men who made them law, could have joined in this decision. Neither so high nor so impregnable today as yesterday is the wall raised between church and state by

[1] "A Bill for Establishing Religious Freedom," enacted by the General Assembly of Virginia, January 19, 1786. See 1 Randall, The Life of Thomas Jefferson (1858) 219–220; XII Hening's Statutes of Virginia (1823) 84.

Virginia's great statute of religious freedom and the First Amendment, now made applicable to all the states by the Fourteenth.[2] New Jersey's statute sustained is the first, if indeed it is not the second breach to be made by this Court's action. That a third, and a fourth, and still others will be attempted, we may be sure. For just as *Cochran* v. *Board of Education*, 281 U. S. 370, has opened the way by oblique ruling[3] for this decision, so will the two make wider the breach for a third. Thus with time the most solid freedom steadily gives way before continuing corrosive decision.

This case forces us to determine squarely for the first time[4] what was "an establishment of religion" in the First Amendment's conception; and by that measure to decide whether New Jersey's action violates its command. The facts may be stated shortly, to give setting and color to the constitutional problem.

By statute New Jersey has authorized local boards of education to provide for the transportation of children "to and from school other than a public school" except one operated for profit wholly or in part, over established public school routes, or by other means when the child lives "remote from any school."[5] The school board of

[2] *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Prince* v. *Massachusetts*, 321 U. S. 158; *Thomas* v. *Collins*, 323 U. S. 516, 530. See note 48.

[3] The briefs did not raise the First Amendment issue. The only one presented was whether the state's action involved a public or an exclusively private function under the due process clause of the Fourteenth Amendment. See Part IV *infra*. On the facts, the cost of transportation here is inseparable from both religious and secular teaching at the religious school. In the *Cochran* case the state furnished secular textbooks only. But see text *infra* at note 40 *et seq.*, and Part IV.

[4] Cf. note 3 and text Part IV; see also note 35.

[5] The statute reads: "Whenever in any district there are children living remote from any schoolhouse, the board of education of the

Ewing Township has provided by resolution for "the transportation of pupils of Ewing to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier. . . ."[6]

Named parents have paid the cost of public conveyance of their children from their homes in Ewing to three public high schools and four parochial schools outside the district.[7] Semiannually the Board has reimbursed the parents from public school funds raised by general taxation. Religion is taught as part of the curriculum in each of the four private schools, as appears affirmatively by the testimony of the superintendent of parochial schools in the Diocese of Trenton.

The Court of Errors and Appeals of New Jersey, reversing the Supreme Court's decision, 132 N. J. L. 98, has held

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district may make rules and contracts for the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part." Laws of New Jersey (1941) c. 191.

[6] The full text of the resolution is given in note 59 *infra*.

[7] The public schools attended were the Trenton Senior High School, the Trenton Junior High School and the Pennington High School. Ewing Township itself provides no public high schools, affording only elementary public schools which stop with the eighth grade. The Ewing school board pays for both transportation and tuitions of pupils attending the public high schools. The only private schools, all Catholic, covered in application of the resolution are St. Mary's Cathedral High School, Trenton Catholic Boys High School, and two elementary parochial schools, St. Hedwig's Parochial School and St. Francis School. The Ewing board pays only for transportation to these schools, not for tuitions. So far as the record discloses the board does not pay for or provide transportation to any other elementary school, public or private. See notes 58, 59 and text *infra*.

the Ewing board's action not in contravention of the state constitution or statutes or of the Federal Constitution 133 N. J. L. 350. We have to consider only whether this ruling accords with the prohibition of the First Amendment implied in the due process clause of the Fourteenth.

I.

Not simply an established church, but any law respecting an establishment of religion is forbidden. The Amendment was broadly but not loosely phrased. It is the compact and exact summation of its author's views formed during his long struggle for religious freedom. In Madison's own words characterizing Jefferson's Bill for Establishing Religious Freedom, the guaranty he put in our national charter, like the bill he piloted through the Virginia Assembly, was "a Model of technical precision, and perspicuous brevity."[8] Madison could not have confused "church" and "religion," or "an established church" and "an establishment of religion."

The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. In proof the Amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question.

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[8] IX Writings of James Madison (ed. by Hunt, 1904) 288; Padover, Jefferson (1942) 74. Madison's characterization related to Jefferson's entire revision of the Virginia Code, of which the Bill for Establishing Religious Freedom was part. See note 15.

"Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.

No one would claim today that the Amendment is constricted, in "prohibiting the free exercise" of religion, to securing the free exercise of some formal or creedal observance, of one sect or of many. It secures all forms of religious expression, creedal, sectarian or nonsectarian wherever and however taking place, except conduct which trenches upon the like freedoms of others or clearly and presently endangers the community's good order and security.[9] For the protective purposes of this phase of the basic freedom street preaching, oral or by distribution of literature, has been given "the same high estate under the First Amendment as . . . worship in the churches and preaching from the pulpits."[10] And on this basis parents have been held entitled to send their children to private, re-

[9] See *Reynolds* v. *United States*, 98 U. S. 145; *Davis* v. *Beason*, 133 U. S. 333; *Mormon Church* v. *United States*, 136 U. S. 1; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Prince* v. *Massachusetts*, 321 U. S. 158; also *Cleveland* v. *United States*, Nos. 12–19, October Term, 1946.

Possibly the first official declaration of the "clear and present danger" doctrine was Jefferson's declaration in the Virginia Statute for Establishing Religious Freedom: "That it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order." 1 Randall, The Life of Thomas Jefferson (1858) 220; Padover, Jefferson (1942) 81. For Madison's view to the same effect, see note 28 *infra*.

[10] *Murdock* v. *Pennsylvania*, 319 U. S. 105, 109; *Martin* v. *Struthers*, 319 U. S. 141; *Jamison* v. *Texas*, 318 U. S. 413; *Marsh* v. *Alabama*, 326 U. S. 501; *Tucker* v. *Texas*, 326 U. S. 517.

ligious schools. *Pierce* v. *Society of Sisters*, 268 U. S. 510. Accordingly, daily religious education commingled with secular is "religion" within the guaranty's comprehensive scope. So are religious training and teaching in whatever form. The word connotes the broadest content, determined not by the form or formality of the teaching or where it occurs, but by its essential nature regardless of those details.

"Religion" has the same broad significance in the twin prohibition concerning "an establishment." The Amendment was not duplicitous. "Religion" and "establishment" were not used in any formal or technical sense. The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.

II.

No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. The history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia,[11] of which the Amend-

[11] Conflicts in other states, and earlier in the colonies, contributed much to generation of the Amendment, but none so directly as that in Virginia or with such formative influence on the Amendment's content and wording. See Cobb, Religious Liberty in America (1902); Sweet, The Story of Religion in America (1939). The Charter of Rhode Island of 1663, II Poore, Constitutions (1878) 1595, was the first colonial charter to provide for religious freedom.

The climactic period of the Virginia struggle covers the decade 1776–1787, from adoption of the Declaration of Rights to enactment of the Statute for Religious Freedom. For short accounts see Padover, Jefferson (1942) c. V; Brant, James Madison, The Virginia Revolutionist (1941) cc. XII, XV; James, The Struggle for Religious Liberty in Virginia (1900) cc. X, XI; Eckenrode, Separation of Church

ment was the direct culmination.[12] In the documents of the times, particularly of Madison, who was leader in the Virginia struggle before he became the Amendment's sponsor, but also in the writings of Jefferson and others and in the issues which engendered them is to be found irrefutable confirmation of the Amendment's sweeping content.

For Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general. Remonstrance, Par. 15, Appendix hereto. Madison was coauthor with George Mason of the religious clause in Virginia's great Declaration of Rights of 1776. He is credited with changing it from a mere statement of the principle of tolerance to the first official legislative pronouncement that freedom of conscience and religion are inherent rights of the individual.[13] He sought also to have the Declaration expressly condemn the existing Virginia establishment.[14] But the forces supporting it were then too strong.

Accordingly Madison yielded on this phase but not for long. At once he resumed the fight, continuing it before succeeding legislative sessions. As a member of the General Assembly in 1779 he threw his full weight behind

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and State in Virginia (1910). These works and Randall, see note 1, will be cited in this opinion by the names of their authors. Citations to "Jefferson" refer to The Works of Thomas Jefferson (ed. by Ford, 1904–1905); to "Madison," to The Writings of James Madison (ed. by Hunt, 1901–1910).

[12] Brant, cc. XII, XV; James, cc. X, XI; Eckenrode.

[13] See Brant, c. XII, particularly at 243. Cf. Madison's Remonstrance, Appendix to this opinion. Jefferson of course held the same view. See note 15.

"Madison looked upon . . . religious freedom, to judge from the concentrated attention he gave it, as the fundamental freedom." Brant, 243; and see Remonstrance, Par. 1, 4, 15, Appendix.

[14] See Brant, 245–246. Madison quoted liberally from the Declaration in his Remonstrance and the use made of the quotations indicates that he considered the Declaration to have outlawed the prevailing establishment in principle, if not technically.

Jefferson's historic Bill for Establishing Religious Freedom. That bill was a prime phase of Jefferson's broad program of democratic reform undertaken on his return from the Continental Congress in 1776 and submitted for the General Assembly's consideration in 1779 as his proposed revised Virginia code.[15] With Jefferson's departure for Europe in 1784, Madison became the Bill's prime sponsor.[16] Enactment failed in successive legislatures from its introduction in June, 1779, until its adoption in January, 1786. But during all this time the fight for religious freedom moved forward in Virginia on various fronts with growing intensity. Madison led throughout, against Patrick Henry's powerful opposing leadership until Henry was elected governor in November, 1784.

The climax came in the legislative struggle of 1784–1785 over the Assessment Bill. See Supplemental Appendix hereto. This was nothing more nor less than a taxing measure for the support of religion, designed to revive the

[15] Jefferson was chairman of the revising committee and chief draftsman. Corevisers were Wythe, Pendleton, Mason and Lee. The first enacted portion of the revision, which became known as Jefferson's Code, was the statute barring entailments. Primogeniture soon followed. Much longer the author was to wait for enactment of the Bill for Religious Freedom; and not until after his death was the corollary bill to be accepted in principle which he considered most important of all; namely, to provide for common education at public expense. See V Jefferson, 153. However, he linked this with disestablishment as corollary prime parts in a system of basic freedoms. I Jefferson, 78.

Jefferson, and Madison by his sponsorship, sought to give the Bill for Establishing Religious Freedom as nearly constitutional status as they could at the time. Acknowledging that one legislature could not "restrain the acts of succeeding Assemblies and that therefore to declare this act to be irrevocable would be of no effect in law," the Bill's concluding provision as enacted nevertheless asserted: "Yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operations, such act will be an infringement of natural right." 1 Randall, 220.

[16] See I Jefferson, 70-71; XII Jefferson, 447; Padover, 80.

payment of tithes suspended since 1777. So long as it singled out a particular sect for preference it incurred the active and general hostility of dissentient groups. It was broadened to include them, with the result that some subsided temporarily in their opposition.[17] As altered, the bill gave to each taxpayer the privilege of designating which church should receive his share of the tax. In default of designation the legislature applied it to pious uses.[18] But what is of the utmost significance here, "in its final form the bill left the taxpayer the option of giving his tax to education."[19]

Madison was unyielding at all times, opposing with all his vigor the general and nondiscriminatory as he had the earlier particular and discriminatory assessments proposed. The modified Assessment Bill passed second reading in December, 1784, and was all but enacted. Madison and his followers, however, maneuvered deferment of final consideration until November, 1785. And before the As-

[17] Madison regarded this action as desertion. See his letter to Monroe of April 12, 1785; II Madison, 129, 131–132; James, cc. X, XI. But see Eckenrode, 91, suggesting it was surrender to the inevitable.

The bill provided: "That for every sum so paid, the Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid. . . ." See also notes 19, 43 *infra*.

A copy of the Assessment Bill is to be found among the Washington manuscripts in the Library of Congress. Papers of George Washington, Vol. 231. Because of its crucial role in the Virginia struggle and bearing upon the First Amendment's meaning, the text of the Bill is set forth in the Supplemental Appendix to this opinion.

[18] Eckenrode, 99, 100.

[19] *Id.*, 100; II Madison, 113. The bill directed the sheriff to pay "all funds which . . . may not be appropriated by the person paying the same . . . into the public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever." Supplemental Appendix.

sembly reconvened in the fall he issued his historic Memorial and Remonstrance.[20]

This is Madison's complete, though not his only, interpretation of religious liberty.[21] It is a broadside attack upon all forms of "establishment" of religion, both general and particular, nondiscriminatory or selective. Reflecting not only the many legislative conflicts over the Assessment Bill and the Bill for Establishing Religious Freedom but also, for example, the struggles for religious incorporations and the continued maintenance of the glebes, the Remonstrance is at once the most concise and the most accurate statement of the views of the First Amendment's author concerning what is "an establishment of religion." Because it behooves us in the dimming distance of time not to lose sight of what he and his coworkers had in mind when, by a single sweeping stroke of the pen, they forbade an establishment of religion and secured its free exercise, the text of the Remonstrance is appended at the end of this opinion for its wider current reference, together with a copy of the bill against which it was directed.

The Remonstrance, stirring up a storm of popular protest, killed the Assessment Bill.[22] It collapsed in committee shortly before Christmas, 1785. With this, the way was cleared at last for enactment of Jefferson's Bill

[20] See generally Eckenrode, c. V; Brant, James, and other authorities cited in note 11 above.

[21] II Madison, 183; and the Appendix to this opinion. Eckenrode, 109 ff. See also Fleet, Madison's "Detached Memoranda" (1946) III William & Mary Q. (3d Series) 534, 554–562.

[22] The major causes assigned for its defeat include the elevation of Patrick Henry to the governorship in November of 1784; the blunder of the proponents in allowing the Bill for Incorporations to come to the floor and incur defeat before the Assessment Bill was acted on; Madison's astute leadership, taking advantage of every "break" to convert his initial minority into a majority, including the deferment of action on the third reading to the fall; the Remonstrance, bringing a flood of protesting petitions; and the general poverty of the time. See Eckenrode, c. V, for an excellent short, detailed account.

for Establishing Religious Freedom. Madison promptly drove it through in January of 1786, seven years from the time it was first introduced. This dual victory substantially ended the fight over establishments, settling the issue against them. See note 33.

The next year Madison became a member of the Constitutional Convention. Its work done, he fought valiantly to secure the ratification of its great product in Virginia as elsewhere, and nowhere else more effectively.[23] Madison was certain in his own mind that under the Constitution "there is not a shadow of right in the general government to intermeddle with religion" [24] and that "this subject is, for the honor of America, perfectly free and unshackled. The Government has no jurisdiction over it. . . ." [25] Nevertheless he pledged that he would work for a Bill of Rights, including a specific guaranty of religious freedom, and Virginia, with other states, ratified the Constitution on this assurance.[26]

Ratification thus accomplished, Madison was sent to the first Congress. There he went at once about performing his pledge to establish freedom for the nation as he had done in Virginia. Within a little more than three years from his legislative victory at home he had proposed and secured the submission and ratification of the First Amendment as the first article of our Bill of Rights.[27]

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[23] See James, Brant, *op. cit. supra* note 11.

[24] V Madison, 176. Cf. notes 33, 37.

[25] V Madison, 132.

[26] Brant, 250. The assurance made first to his constituents was responsible for Madison's becoming a member of the Virginia Convention which ratified the Constitution. See James, 154–158.

[27] The amendment with respect to religious liberties read, as Madison introduced it: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 Annals of Congress 434. In the process of debate this was modified to its present form. See especially 1 Annals of Congress 729–731, 765; also note 34.

All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship. He epitomized the whole of that tradition in the Amendment's compact, but nonetheless comprehensive, phrasing.

As the Remonstrance discloses throughout, Madison opposed every form and degree of official relation between religion and civil authority. For him religion was a wholly private matter beyond the scope of civil power either to restrain or to support.[28] Denial or abridgment of religious freedom was a violation of rights both of conscience and of natural equality. State aid was no less obnoxious or destructive to freedom and to religion itself than other forms of state interference. "Establishment" and "free exercise" were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom. The Remonstrance, following the Virginia statute's example, referred to the history of religious conflicts and the effects of all sorts of establishments, current and historical, to suppress religion's free exercise. With Jefferson, Madison believed that to tolerate any fragment of establishment would be by so much to perpetuate restraint upon that freedom. Hence he sought to tear out the institution not partially but root and branch, and to bar its return forever.

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[28] See text of the Remonstrance, Appendix; also notes 13, 15, 24, 25 *supra* and text.

Madison's one exception concerning restraint was for "preserving public order." Thus he declared in a private letter, IX Madison, 484, 487, written after the First Amendment was adopted: "The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded agst. by an entire abstinance of the Govt. from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect agst. trespasses on its legal rights by others." Cf. note 9.

In no phase was he more unrelentingly absolute than in opposing state support or aid by taxation. Not even "three pence" contribution was thus to be exacted from any citizen for such a purpose. Remonstrance, Par. 3.[29] Tithes had been the life blood of establishment before and after other compulsions disappeared. Madison and his coworkers made no exceptions or abridgments to the complete separation they created. Their objection was not to small tithes. It was to any tithes whatsoever. "If it were lawful to impose a small tax for religion the admission would pave the way for oppressive levies."[30] Not the amount but "the principle of assessment was wrong." And the principle was as much to prevent "the interference of law in religion" as to restrain religious intervention in political matters.[31] In this field the authors of our freedom would not tolerate "the first experiment on our liberties" or "wait till usurped power had strengthened itself by exercise, and entangled the question in precedents." Remonstrance, Par. 3. Nor should we.

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[29] The third ground of remonstrance, see the Appendix, bears repetition for emphasis here: "Because, it is proper to take alarm at the first experiment on our liberties . . . The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that . . . the same authority which can force a citizen to *contribute three pence* only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" (Emphasis added.) II Madison 183, 185–186.

[30] Eckenrode, 105, in summary of the Remonstrance.

[31] "Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth, or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretention falsified by the contradictory opinion of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation." Remonstrance, Appendix, Par. 5; II Madison 183, 187.

In view of this history no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises. But if more were called for, the debates in the First Congress and this Court's consistent expressions, whenever it has touched on the matter directly,[22] supply it.

By contrast with the Virginia history, the congressional debates on consideration of the Amendment reveal only sparse discussion, reflecting the fact that the essential issues had been settled.[23] Indeed the matter had become so well understood as to have been taken for granted in all but formal phrasing. Hence, the only en-

[22] As is pointed out above, note 3, and in Part IV *infra*, *Cochran* v. *Board of Education*, 281 U. S. 370, was not such a case.

[23] See text *supra* at notes 24, 25. Madison, of course, was but one of many holding such views, but nevertheless agreeing to the common understanding for adoption of a Bill of Rights in order to remove all doubt engendered by the absence of explicit guaranties in the original Constitution.

By 1791 the great fight over establishments had ended, although some vestiges remained then and later, even in Virginia. The glebes, for example, were not sold there until 1802. Cf. Eckenrode, 147. Fixing an exact date for "disestablishment" is almost impossible, since the process was piecemeal. Although Madison failed in having the Virginia Bill of Rights declare explicitly against establishment in 1776, cf. note 14 and text *supra*, in 1777 the levy for support of the Anglican clergy was suspended. It was never resumed. Eckenrode states: "This act, in effect, destroyed the establishment. Many dates have been given for its end, but it really came on January 1, 1777, when the act suspending the payment of tithes became effective. This was not seen at the time. . . . But in freeing almost half of the taxpayers from the burden of the state religion, the state religion was at an end. Nobody could be forced to support it, and an attempt to levy tithes upon Anglicans alone would be to recruit the ranks of dissent." P. 53. See also pp. 61, 64. The question of assessment however was revived "with far more strength than ever, in the summer of 1784." *Id.*, 64. It would seem more factual therefore to fix the time of disestablishment as of December, 1785-January, 1786, when the issue in large was finally settled.

lightening reference shows concern, not to preserve any power to use public funds in aid of religion, but to prevent the Amendment from outlawing private gifts inadvertently by virtue of the breadth of its wording.[34] In the margin are noted also the principal decisions in which expressions of this Court confirm the Amendment's broad prohibition.[35]

III.

Compulsory attendance upon religious exercises went out early in the process of separating church and state,

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[34] At one point the wording was proposed: "No religion shall be established by law, nor shall the rights of conscience be infringed." 1 Annals of Congress 729. Cf. note 27. Representative Huntington of Connecticut feared this might be construed to prevent judicial enforcement of private pledges. He stated "that he feared . . . that the words might be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia; but others might find it convenient to put another construction upon it. The ministers of their congregations to the Eastward were maintained by the contributions of those who belonged to their society; the expense of building meeting-houses was contributed in the same manner. These things were regulated by by-laws. If an action was brought before a Federal Court on any of these cases, the person who had neglected to perform his engagements could not be compelled to do it; for a support of ministers or building of places of worship might be construed into a religious establishment." 1 Annals of Congress 730.

To avoid any such possibility, Madison suggested inserting the word "national" before "religion," thereby not only again disclaiming intent to bring about the result Huntington feared but also showing unmistakably that "establishment" meant public "support" of religion in the financial sense. I Annals of Congress 731. See also IX Madison, 484–487.

[35] The decision most closely touching the question, where it was squarely raised, is *Quick Bear* v. *Leupp*, 210 U. S. 50. The Court distinguished sharply between appropriations from public funds for the support of religious education and appropriations from funds held in trust by the Government essentially as trustee for private individuals, Indian wards, as beneficial owners. The ruling was that

together with forced observance of religious forms and ceremonies.[36] Test oaths and religious qualification for office followed later.[37] These things none devoted to our great tradition of religious liberty would think of bringing back. Hence today, apart from efforts to inject religious training or exercises and sectarian issues into the public schools, the only serious surviving threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through use of the taxing power to support religion, religious establishments, or establishments having a religious foundation whatever their form or special religious function.

Does New Jersey's action furnish support for religion by use of the taxing power? Certainly it does, if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own.[38] Today as then the furnishing of "con-

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the latter could be disbursed to private, religious schools at the designation of those patrons for paying the cost of their education. But it was stated also that such a use of public moneys would violate both the First Amendment and the specific statutory declaration involved, namely, that "it is hereby declared to be the settled policy of the government to hereafter make no appropriation whatever for education in any sectarian school." 210 U. S. at 79. Cf. *Ponce* v. *Roman Catholic Apostolic Church*, 210 U. S. 296, 322. And see *Bradfield* v. *Roberts*, 175 U. S. 291, an instance of highly artificial grounding to support a decision sustaining an appropriation for the care of indigent patients pursuant to a contract with a private hospital. Cf. also the authorities cited in note 9.

[36] See text at note 1.

[37] ". . . but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Const., Art. VI, § 3. See also the two forms prescribed for the President's Oath or Affirmation. Const., Art. II, § 1. Cf. *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277; *Lovett* v. *United States*, 328 U. S. —.

[38] In the words of the Virginia statute, following the portion of the preamble quoted at the beginning of this opinion: ". . . even the

tributions of money for the propagation of opinions which he disbelieves" is the forbidden exaction; and the prohibition is absolute for whatever measure brings that consequence and whatever amount may be sought or given to that end.

The funds used here were raised by taxation. The Court does not dispute, nor could it, that their use does in fact give aid and encouragement to religious instruction. It only concludes that this aid is not "support" in law. But Madison and Jefferson were concerned with aid and support in fact, not as a legal conclusion "entangled in precedents." Remonstrance, Par. 3. Here parents pay money to send their children to parochial schools and funds raised by taxation are used to reimburse them. This not only helps the children to get to school and the parents to send them. It aids them in a substantial way to get the very thing which they are sent to the particular school to secure, namely, religious training and teaching.

Believers of all faiths, and others who do not express their feeling toward ultimate issues of existence in any creedal form, pay the New Jersey tax. When the money so raised is used to pay for transportation to religious schools, the Catholic taxpayer to the extent of his proportionate share pays for the transportation of Lutheran, Jewish and otherwise religiously affiliated children to receive their non-Catholic religious instruction. Their parents likewise pay proportionately for the transportation of Catholic children to receive Catholic instruction. Each thus contributes to "the propagation of opinions which he disbe-

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forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labors for the instruction of mankind." Cf. notes 29, 30, 31 and text *supra*.

lieves" in so far as their religions differ, as do others who accept no creed without regard to those differences. Each thus pays taxes also to support the teaching of his own religion, an exaction equally forbidden since it denies "the comfortable liberty" of giving one's contribution to the particular agency of instruction he approves.[39]

New Jersey's action therefore exactly fits the type of exaction and the kind of evil at which Madison and Jefferson struck. Under the test they framed it cannot be said that the cost of transportation is no part of the cost of education or of the religious instruction given. That it is a substantial and a necessary element is shown most plainly by the continuing and increasing demand for the state to assume it. Nor is there pretense that it relates only to the secular instruction given in religious schools or that any attempt is or could be made toward allocating proportional shares as between the secular and the religious instruction. It is precisely because the instruction is religious and relates to a particular faith, whether one or another, that parents send their children to religious schools under the *Pierce* doctrine. And the very purpose of the state's contribution is to defray the cost of conveying the pupil to the place where he will receive not simply secular, but also and primarily religious, teaching and guidance.

Indeed the view is sincerely avowed by many of various faiths,[40] that the basic purpose of all education is or should be religious, that the secular cannot be and should not be

[39] See note 38.

[40] See Bower, Church and State in Education (1944) 58: ". . . the fundamental division of the education of the whole self into the secular and the religious could not be justified on the grounds of either a sound educational philosophy or a modern functional concept of the relation of religion to personal and social experience." See also Vere, The Elementary School, in Essays on Catholic Education in the United States (1942) 110–111; Gabel, Public Funds for Church and Private Schools (1937) 737–739.

separated from the religious phase and emphasis. Hence, the inadequacy of public or secular education and the necessity for sending the child to a school where religion is taught. But whatever may be the philosophy or its justification, there is undeniably an admixture of religious with secular teaching in all such institutions. That is the very reason for their being. Certainly for purposes of constitutionality we cannot contradict the whole basis of the ethical and educational convictions of people who believe in religious schooling.

Yet this very admixture is what was disestablished when the First Amendment forbade "an establishment of religion." Commingling the religious with the secular teaching does not divest the whole of its religious permeation and emphasis or make them of minor part, if proportion were material. Indeed, on any other view, the constitutional prohibition always could be brought to naught by adding a modicum of the secular.

An appropriation from the public treasury to pay the cost of transportation to Sunday school, to weekday special classes at the church or parish house, or to the meetings of various young people's religious societies, such as the Y. M. C. A., the Y. W. C. A., the Y. M. H. A., the Epworth League, could not withstand the constitutional attack. This would be true, whether or not secular activities were mixed with the religious. If such an appropriation could not stand, then it is hard to see how one becomes valid for the same thing upon the more extended scale of daily instruction. Surely constitutionality does not turn on where or how often the mixed teaching occurs.

Finally, transportation, where it is needed, is as essential to education as any other element. Its cost is as much a part of the total expense, except at times in amount, as the cost of textbooks, of school lunches, of athletic equipment, of writing and other materials; indeed of all other

items composing the total burden. Now as always the core of the educational process is the teacher-pupil relationship. Without this the richest equipment and facilities would go for naught. See *Judd* v. *Board of Education*, 278 N. Y. 200, 212. But the proverbial Mark Hopkins conception no longer suffices for the country's requirements. Without buildings, without equipment, without library, textbooks and other materials, and without transportation to bring teacher and pupil together in such an effective teaching environment, there can be not even the skeleton of what our times require. Hardly can it be maintained that transportation is the least essential of these items, or that it does not in fact aid, encourage, sustain and support, just as they do, the very process which is its purpose to accomplish. No less essential is it, or the payment of its cost, than the very teaching in the classroom or payment of the teacher's sustenance. Many types of equipment, now considered essential, better could be done without.

For me, therefore, the feat is impossible to select so indispensable an item from the composite of total costs, and characterize it as not aiding, contributing to, promoting or sustaining the propagation of beliefs which it is the very end of all to bring about. Unless this can be maintained, and the Court does not maintain it, the aid thus given is outlawed. Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. Nor is it any the less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve. No rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation. The only line that can be so drawn is one between more dollars and less. Certainly in this realm such a line can be no valid constitutional measure.

Murdock v. *Pennsylvania*, 319 U. S. 105; *Thomas* v. *Collins*, 323 U. S. 516.[41] Now, as in Madison's time, not the amount but the principle of assessment is wrong. Remonstrance, Par. 3.

IV.

But we are told that the New Jersey statute is valid in its present application because the appropriation is for a public, not a private purpose, namely, the promotion of education, and the majority accept this idea in the conclusion that all we have here is "public welfare legislation." If that is true and the Amendment's force can be thus destroyed, what has been said becomes all the more pertinent. For then there could be no possible objection to more extensive support of religious education by New Jersey.

If the fact alone be determinative that religious schools are engaged in education, thus promoting the general and individual welfare, together with the legislature's decision that the payment of public moneys for their aid makes their work a public function, then I can see no possible basis, except one of dubious legislative policy, for the state's refusal to make full appropriation for support of private, religious schools, just as is done for public

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[41] It would seem a strange ruling that a "reasonable," that is, presumably a small, license fee cannot be placed upon the exercise of the right of religious instruction, yet that under the correlative constitutional guaranty against "an establishment" taxes may be levied and used to aid and promote religious instruction, if only the amounts so used are small. See notes 30–31 *supra* and text.

Madison's objection to "three pence" contributions and his stress upon "denying the principle" without waiting until "usurped power had . . . entangled the question in precedents," note 29, were reinforced by his further characterization of the Assessment Bill: "Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance." Remonstrance, Par. 9; II Madison 183, 188.

instruction. There could not be, on that basis, valid constitutional objection.[42]

Of course paying the cost of transportation promotes the general cause of education and the welfare of the individual. So does paying all other items of educational expense. And obviously, as the majority say, it is much too late to urge that legislation designed to facilitate the opportunities of children to secure a secular education serves no public purpose. Our nation-wide system of public education rests on the contrary view, as do all grants in aid of education, public or private, which is not religious in character.

These things are beside the real question. They have no possible materiality except to obscure the all-pervading, inescapable issue. *Cf. Cochran* v. *Board of Education, supra.* Stripped of its religious phase, the case presents no substantial federal question. *Ibid.* The public function argument, by casting the issue in terms of promoting the general cause of education and the welfare of the individual, ignores the religious factor and its essential connection with the transportation, thereby leaving out the only vital element in the case. So of course do the "public welfare" and "social legislation" ideas, for they come to the same thing.

[42] If it is part of the state's function to supply to religious schools or their patrons the smaller items of educational expense, because the legislature may say they perform a public function, it is hard to see why the larger ones also may not be paid. Indeed, it would seem even more proper and necessary for the state to do this. For if one class of expenditures is justified on the ground that it supports the general cause of education or benefits the individual, or can be made to do so by legislative declaration, so even more certainly would be the other. To sustain payment for transportation to school, for textbooks, for other essential materials, or perhaps for school lunches, and not for what makes all these things effective for their intended end, would be to make a public function of the smaller items and their cumulative effect, but to make wholly private in character the larger things without which the smaller could have no meaning or use.

We have here then one substantial issue, not two. To say that New Jersey's appropriation and her use of the power of taxation for raising the funds appropriated are not for public purposes but are for private ends, is to say that they are for the support of religion and religious teaching. Conversely, to say that they are for public purposes is to say that they are not for religious ones.

This is precisely for the reason that education which includes religious training and teaching, and its support, have been made matters of private right and function, not public, by the very terms of the First Amendment. That is the effect not only in its guaranty of religion's free exercise, but also in the prohibition of establishments. It was on this basis of the private character of the function of religious education that this Court held parents entitled to send their children to private, religious schools. *Pierce* v. *Society of Sisters, supra.* Now it declares in effect that the appropriation of public funds to defray part of the cost of attending those schools is for a public purpose. If so, I do not understand why the state cannot go farther or why this case approaches the verge of its power.

In truth this view contradicts the whole purpose and effect of the First Amendment as heretofore conceived. The "public function"—"public welfare"—"social legislation" argument seeks, in Madison's words, to "employ Religion [that is, here, religious education] as an engine of Civil policy." Remonstrance, Par. 5. It is of one piece with the Assessment Bill's preamble, although with the vital difference that it wholly ignores what that preamble explicitly states.[43]

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[43] "Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, can-

Our constitutional policy is exactly the opposite. It does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private. It cannot be made a public one by legislative act. This was the very heart of Madison's Remonstrance, as it is of the Amendment itself.

It is not because religious teaching does not promote the public or the individual's welfare, but because neither is furthered when the state promotes religious education, that the Constitution forbids it to do so. Both legislatures and courts are bound by that distinction. In failure to observe it lies the fallacy of the "public function"—"social legislation" argument, a fallacy facilitated by easy transference of the argument's basing from due process unrelated to any religious aspect to the First Amendment.

By no declaration that a gift of public money to religious uses will promote the general or individual welfare, or the cause of education generally, can legislative bodies overcome the Amendment's bar. Nor may the courts sustain their attempts to do so by finding such consequences for appropriations which in fact give aid to or promote religious uses. Cf. *Norris* v. *Alabama*, 294 U. S. 587, 590;

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not otherwise attain such knowledge; and it is judged that such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies of communities of Christians; . . ." Supplemental Appendix; Foote, Sketches of Virginia (1850) 340.

Hooven & Allison Co. v. *Evatt*, 324 U. S. 652, 659; *Akins* v. *Texas*, 325 U. S. 398, 402. Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small. No such finding has been or could be made in this case. The Amendment has removed this form of promoting the public welfare from legislative and judicial competence to make a public function. It is exclusively a private affair.

The reasons underlying the Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Madison's Remonstrance, Par. 6, 8.[44] The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting. *Id.*, Par. 7, 8.[45] Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit

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[44] "Because the Establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world, . . . Because the establishment in question is not necessary for the support of Civil Government. . . . What influence in fact have ecclesiastical establishments had on Civil Society? . . . in no instance have they been seen the guardians of the liberties of the people." II Madison 183, 187, 188.

[45] "Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." II Madison 183, 187.

most, there another. That is precisely the history of societies which have had an established religion and dissident groups. *Id.*, Par. 8, 11. It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms. *Ibid.* The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions. *Id.*, Par. 11.[46]

Exactly such conflicts have centered of late around providing transportation to religious schools from public funds.[47] The issue and the dissension work typically, in Madison's phrase, to "destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects." *Id.*, Par. 11. This occurs, as he well knew, over measures

[46] "At least let warning be taken at the first fruit of the threatened innovation. The very appearance of the Bill has transformed that 'Christian forebearance, love and charity,' which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased." II Madison 183, 189.

[47] In this case briefs *amici curiae* have been filed on behalf of various organizations representing three religious sects, one labor union, the American Civil Liberties Union, and the states of Illinois, Indiana, Louisiana, Massachusetts, Michigan and New York. All these states have laws similar to New Jersey's and all of them, with one religious sect, support the constitutionality of New Jersey's action. The others oppose it. Maryland and Mississippi have sustained similar legislation. Note 49 *infra*. No state without legislation of this sort has filed an opposing brief. But at least seven states have held such action invalid, namely, Delaware, Kentucky, Oklahoma, New York, South Dakota, Washington and Wisconsin. Note 49 *infra*. The New York ruling was overturned by amendment to the state constitution in 1938. Constitution of New York, Art. XI, 4.

Furthermore, in this case the New Jersey courts divided, the Supreme Court holding the statute and resolution invalid, 132 N. J. L. 98, the Court of Errors and Appeals reversing that decision, 133 N. J. L. 350. In both courts, as here, the judges split, one of three dissenting in the Supreme Court, three of nine in the Court of Errors and Appeals. The division is typical. See the cases cited in note 49.

at the very threshold of departure from the principle. *Id.*, Par. 3, 9, 11.

In these conflicts wherever success has been obtained it has been upon the contention that by providing the transportation the general cause of education, the general welfare, and the welfare of the individual will be forwarded; hence that the matter lies within the realm of public funtion, for legislative determination.[48] State courts have divided upon the issue, some taking the view that only the individual, others that the institution receives the benefit.[49] A few have recognized that this dichotomy is false, that both in fact are aided.[50]

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[48] See the authorities cited in note 49; and see note 54.

[49] Some state courts have sustained statutes granting free transportation or free school books to children attending denominational schools on the theory that the aid was a benefit to the child rather than to the school. See *Cochran* v. *Board of Education*, 168 La. 1030, aff'd., 281 U. S. 370; *Borden* v. *Board of Education*, 168 La. 1005; *Board of Education* v. *Wheat*, 174 Md. 314; *Adams* v. *St. Mary's County*, 180 Md. 550; *Chance v. State Textbook R. & O. Board*, 190 Miss. 453. See also *Bowker* v. *Baker*, — Cal. App. —, 167 P. (2d) 256. Other courts have held such statutes unconstitutional under state constitutions as aid to the schools. *Judd* v. *Board of Education*, 278 N. Y. 200, but see note 47 *supra*; *Smith* v. *Donahue*, 202 App. Div. 656; *State ex rel. Traub* v. *Brown*, 36 Del. 181; *Gurney* v. *Ferguson*, 190 Okla. 254; *Mitchell* v. *Consolidated School District*, 17 Wash. (2d) 61; *Sherrard* v. *Jefferson County Board of Education*, 294 Ky. 469; *Von Straten* v. *Milquet*, 180 Wis. 109. And cf. *Hlebanja* v. *Brewe*, 58 S. D. 351. And since many state constitutions have provisions forbidding the appropriation of public funds for private purposes, in these and other cases the issue whether the statute was for a "public" or "private" purpose has been present. See Note (1941) 50 Yale L. J. 917, 925.

[50] *E. g.*, *Gurney* v. *Ferguson*, 190 Okla. 254, 255; *Mitchell* v. *Consolidated School District*, 17 Wash. (2d) 61, 68; *Smith* v. *Donahue*, 202 App. Div. 655, 664; *Board of Education* v. *Wheat*, 174 Md. 316, dissenting opinion at 340. This is true whether the appropriation and payment are in form to the individual or to the institution. *Ibid.* Questions of this gravity turn upon the purpose and effect of the state's expenditure to accomplish the forbidden object, not upon who receives the amount and applies it to that end or the form and manner of the payment.

Nichols v Henry, 301 Ky. 434) with which

The majority here does not accept in terms any of those views. But neither does it deny that the individual or the school, or indeed both, are benefited directly and substantially.[31] To do so would cut the ground from under the public function—social legislation thesis. On the contrary, the opinion concedes that the children are aided by being helped to get to the religious schooling. By converse necessary implication as well as by the absence of express denial, it must be taken to concede also that the school is helped to reach the child with its religious teaching. The religious enterprise is common to both, as is the interest in having transportation for its religious purposes provided.

Notwithstanding the recognition that this two-way aid is given and the absence of any denial that religious teaching is thus furthered, the Court concludes that the aid so given is not "support" of religion. It is rather only support of education as such, without reference to its religious content, and thus becomes public welfare legislation. To this elision of the religious element from the case is added gloss in two respects, one that the aid extended partakes of the nature of a safety measure, the other that failure to provide it would make the state unneutral in religious matters, discriminating against or hampering such children concerning public benefits all others receive.

As will be noted, the one gloss is contradicted by the facts of record and the other is of whole cloth with the "public function" argument's excision of the religious factor.[32] But most important is that this approach, if valid, supplies a ready method for nullifying the Amendment's guaranty, not only for this case and others involving small grants in aid for religious education, but equally for larger ones. The only thing needed will be for the Court again

[31] The payments here averaged roughly $40.00 a year per child.

[32] See Part V.

to transplant the "public welfare—public function" view from its proper nonreligious due process bearing to First Amendment application, holding that religious education is not "supported" though it may be aided by the appropriation, and that the cause of education generally is furthered by helping the pupil to secure that type of training.

This is not therefore just a little case over bus fares. In paraphrase of Madison, distant as it may be in its present form from a complete establishment of religion, it differs from it only in degree; and is the first step in that direction. *Id.*, Par. 9.[53] Today as in his time "the same authority which can force a citizen to contribute three pence only . . . for the support of any one religious establishment, may force him" to pay more; or "to conform to any other establishment in all cases whatsoever." And now, as then, "either . . . we must say, that the will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred." Remonstrance, Par. 15.

The realm of religious training and belief remains, as the Amendment made it, the kingdom of the individual man and his God. It should be kept inviolately private, not "entangled . . . in precedents" [54] or confounded with what legislatures legitimately may take over into the public domain.

V.

No one conscious of religious values can be unsympathetic toward the burden which our constitutional separa-

[53] See also note 46 *supra* and Remonstrance, Par. 3.

[54] Thus each brief filed here by the supporters of New Jersey's action, see note 47, not only relies strongly on *Cochran* v. *Board of Education*, 281 U. S. 370, but either explicitly or in effect maintains that it is controlling in the present case.

tion puts on parents who desire religious instruction mixed with secular for their children. They pay taxes for others' children's education, at the same time the added cost of instruction for their own. Nor can one happily see benefits denied to children which others receive, because in conscience they or their parents for them desire a different kind of training others do not demand.

But if those feelings should prevail, there would be an end to our historic constitutional policy and command. No more unjust or discriminatory in fact is it to deny attendants at religious schools the cost of their transportation than it is to deny them tuitions, sustenance for their teachers, or any other educational expense which others receive at public cost. Hardship in fact there is which none can blink. But, for assuring to those who undergo it the greater, the most comprehensive freedom, it is one written by design and firm intent into our basic law.

Of course discrimination in the legal sense does not exist. The child attending the religious school has the same right as any other to attend the public school. But he foregoes exercising it because the same guaranty which assures this freedom forbids the public school or any agency of the state to give or aid him in securing the religious instruction he seeks.

Were he to accept the common school, he would be the first to protest the teaching there of any creed or faith not his own. And it is precisely for the reason that their atmosphere is wholly secular that children are not sent to public schools under the *Pierce* doctrine. But that is a constitutional necessity, because we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion. Remonstrance, Par. 8, 12.

That policy necessarily entails hardship upon persons who forego the right to educational advantages the state

can supply in order to secure others it is precluded from giving. Indeed this may hamper the parent and the child forced by conscience to that choice. But it does not make the state unneutral to withhold what the Constitution forbids it to give. On the contrary it is only by observing the prohibition rigidly that the state can maintain its neutrality and avoid partisanship in the dissensions inevitable when sect opposes sect over demands for public moneys to further religious education, teaching or training in any form or degree, directly or indirectly. Like St. Paul's freedom, religious liberty with a great price must be bought. And for those who exercise it most fully, by insisting upon religious education for their children mixed with secular, by the terms of our Constitution the price is greater than for others.

The problem then cannot be cast in terms of legal discrimination or its absence. This would be true, even though the state in giving aid should treat all religious instruction alike. Thus, if the present statute and its application were shown to apply equally to all religious schools of whatever faith,[55] yet in the light of our tradition it could not stand. For then the adherent of one creed still would pay for the support of another, the childless taxpayer with others more fortunate. Then too there would seem to be no bar to making appropriations for transportation and other expenses of children attending public or other secular schools, after hours in separate places and classes for their exclusively religious instruction. The person who embraces no creed also would be forced to pay for teaching what he does not believe. Again, it was the furnishing of

[55] See text at notes 17–19 *supra* and authorities cited; also Foote, Sketches of Virginia (1850) c. XV. Madison's entire thesis, as reflected throughout the Remonstrance and in his other writings, as well as in his opposition to the final form of the Assessment Bill, see note 43, was altogether incompatible with acceptance of general and "nondiscriminatory" support. See Brant, c. XII.

"contributions of money for the propagation of opinions which he disbelieves" that the fathers outlawed. That consequence and effect are not removed by multiplying to all-inclusiveness the sects for which support is exacted. The Constitution requires, not comprehensive identification of state with religion, but complete separation.

VI.

Short treatment will dispose of what remains. Whatever might be said of some other application of New Jersey's statute, the one made here has no semblance of bearing as a safety measure or, indeed, for securing expeditious conveyance. The transportation supplied is by public conveyance, subject to all the hazards and delays of the highway and the streets incurred by the public generally in going about its multifarious business.

Nor is the case comparable to one of furnishing fire or police protection, or access to public highways. These things are matters of common right, part of the general need for safety.[56] Certainly the fire department must not

[56] The protections are of a nature which does not require appropriations specially made from the public treasury and earmarked, as is New Jersey's here, particularly for religious institutions or uses. The First Amendment does not exclude religious property or activities from protection against disorder or the ordinary accidental incidents of community life. It forbids support, not protection from interference or destruction.

It is a matter not frequently recalled that President Grant opposed tax exemption of religious property as leading to a violation of the principle of separation of church and state. See President Grant's Seventh Annual Message to Congress, December 7, 1875, in IX Messages and Papers of the Presidents (1897) 4288–4289. Garfield, in a letter accepting the nomination for the presidency, said: ". . . it would be unjust to our people, and dangerous to our institutions, to apply any portion of the revenues of the nation, or of the States, to the support of sectarian schools. The separation of the Church and the State in everything relating to taxation should be absolute." II The Works of James Abram Garfield (ed. by Hinsdale, 1883) 783.

stand idly by while the church burns. Nor is this reason why the state should pay the expense of transportation or other items of the cost of religious education.[57]

Needless to add, we have no such case as *Green* v. *Frazier*, 253 U. S., or *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, which dealt with matters wholly unrelated to the First Amendment, involving only situations where the "public function" issue was determinative.

I have chosen to place my dissent upon the broad ground I think decisive, though strictly speaking the case might be decided on narrower issues. The New Jersey statute might be held invalid on its face for the exclusion of children who attend private, profit-making schools.[58] I cannot assume, as does the majority, that the New Jersey courts would write off this explicit limitation from the statute. Moreover, the resolution by which the statute was applied expressly limits its benefits to students of public and Catholic schools.[59] There is no showing that there

[57] Neither do we have here a case of rate-making by which a public utility extends reduced fares to all school children, including patrons of religious schools. Whether or not legislative compulsion upon a private utility to extend such an advantage would be valid, or its extension by a municipally owned system, we are not required to consider. In the former instance, at any rate, and generally if not always in the latter, the vice of using the taxing power to raise funds for the support of religion would not be present.

[58] It would seem at least a doubtfully sufficient basis for reasonable classification that some children should be excluded simply because the only school feasible for them to attend, in view of geographic or other situation, might be one conducted in whole *or in part* for profit. Cf. note 5.

[59] See note 7 *supra*. The resolution was as follows, according to the school board's minutes read in proof: "The transportation committee recommended the transportation of pupils of Ewing to the Trenton and Pennington High Schools *and Catholic Schools* by way of public carrier as in recent years. On Motion of Mr. Ralph Ryan and Mr. M. French the same was adopted." (Emphasis added.) The New Jersey court's holding that the resolution was within the authority conferred by the state statute is binding on us. *Reinman* v. *Little Rock*, 237 U. S. 171, 176; *Hadacheck* v. *Sebastian*, 239 U. S. 394, 414.

are no other private or religious schools in this populous district.[80] I do not think it can be assumed there were none.[81] But in the view I have taken, it is unnecessary to limit grounding to these matters.

Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools. See Johnson, The Legal Status of Church-State Relationships in the United States (1934); Thayer, Religion in Public Education (1947); Note (1941) 50 Yale L. J. 917. In my opinion both avenues were closed by the Constitution. Neither should be opened by this Court. The matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from

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[80] The population of Ewing Township, located near the City of Trenton, was 10,146 according to the census of 1940. Sixteenth Census of the United States, Population, Vol. 1, 674.

[81] In *Thomas* v. *Collins*, 323 U. S. 516, 530, it was said that the preferred place given in our scheme to the great democratic freedoms secured by the First Amendment gives them "a sanctity and a sanction not permitting dubious intrusions." Cf. Remonstrance, Par. 3, 9. And in other cases it has been held that the usual presumption of constitutionality will not work to save such legislative excursions in this field. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, note 4; see Wechsler, Stone and the Constitution (1946) 46 Col. L. Rev. 764, 795 *et seq.*

Apart from the Court's admission that New Jersey's present action approaches the verge of her power, it would seem that a statute, ordinance or resolution which on its face singles out one sect only by name for enjoyment of the same advantages as public schools or their students, should be held discriminatory on its face by virtue of that fact alone, unless it were positively shown that no other sects sought or were available to receive the same advantages.

becoming entangled in corrosive precedents. We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other.

The judgment should be reversed.

APPENDIX.

MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSEMENTS.

To the Honorable the General Assembly
of
the Commonwealth of Virginia.
A Memorial and Remonstrance.

We, the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled "A Bill establishing a provision for Teachers of the Christian Religion," and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State, to remonstrate against it, and to declare the reasons by which we are determined. We remonstrate against the said Bill,

1. Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence."[1] The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It it unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of

[1] Decl. Rights, Art: 16. [Note in the original.]

Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority.

2. Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.

3. Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest char-

acteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

4. Because, the bill violates that equality which ought to be the basis of every law, and which is more indispensible, in proportion as the validity or expediency of any law is more liable to be impeached. If "all men are by nature equally free and independent," [1] all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "*equal* title to the free exercise of Religion according to the dictates of conscience" [2] Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions. Are

[1] Decl. Rights, Art. 1. [Note in the original.]

[2] Art. 16. [Note in the original.]

the Quakers and Menonists the only sects who think a compulsive support of their religions unnecessary and unwarantable? Can their piety alone be intrusted with the care of public worship? Ought their Religions to be endowed above all others, with extraordinary privileges, by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations, to believe that they either covet pre-eminencies over their fellow citizens, or that they will be seduced by them, from the common opposition to the measure.

5. Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation.

6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; and not only during the period of miraculous aid, but long after it had been left to its own evidence, and the ordinary care of Providence: Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.

7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration of this primitive state in which its Teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have greatest weight, when for or when against ther interest?

8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within [the] cognizance of Civil Government, how can its legal establishment be said to be necessary to civil Government? What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberties, may have found an established clergy convenient auxiliaries. A just government, instituted to secure & perpetuate it, needs them not. Such a government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property;

by neither invading the equal rights by any Sect, nor suffering any Sect to invade those of another.

9. Because the proposed establishment is a departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthrophy in their due extent may offer a more certain repose from his troubles.

10. Because, it will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration, by revoking the liberty which they now enjoy, would be the same species of folly which has dishonoured and depopulated flourishing kingdoms.

11. Because, it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs, that equal and

compleat liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bonds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruit of the threatened innovation. The very appearance of the Bill has transformed that "Christian forbearance,[1] love and charity," which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded should this enemy to the public quiet be armed with the force of a law?

12. Because, the policy of the bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift, ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of false Religions; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of [revelation] from coming into the Region of it; and countenances, by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of levelling as far as possible, every obstacle to the victorious progress of truth, the Bill with an ignoble and unchristian timidity would circumscribe it, with a wall of defence, against the encroachments of error.

13. Because attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must

[1] Art. 16. [Note in the original.]

be the case where it is deemed invalid and dangerous? and what may be the effect of so striking an example of impotency in the Government, on its general authority.

14. Because a measure of such singular magnitude and delicacy ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens: and no satisfactory method is yet proposed by which the voice of the majority in this case may be determined, or its influence secured. "The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next Session of Assembly." But the representation must be made equal, before the voice either of the Representatives or of the Counties, will be that of the people. Our hope is that neither of the former will, after due consideration, espouse the dangerous principle of the Bill. Should the event disappoint us, it will still leave us in full confidence, that a fair appeal to the latter will reverse the sentence against our liberties.

15. Because, finally, "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience" is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the Declaration of those rights which pertain to the good people of Virginia, as the "basis and foundation of Government,"[1] it is enumerated with equal solemnity, or rather studied emphasis. Either then, we must say, that the will of the Legislature is the only measure of their authority; and that in the plentitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say,

[1] Decl. Rights-title. [Note in the original.]

that they may controul the freedom of the press, may abolish the trial by jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary assembly: or we must say, that they have no authority to enact into law the Bill under consideration. We the subscribers say, that the General Assembly of this Commonwealth have no such authority: And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his [blessing, may redound to their own praise, and may establish more firmly the liberties, the prosperity, and the Happiness of the Commonwealth.

II Madison, 183–191.

SUPPLEMENTAL APPENDIX.

A BILL ESTABLISHING A PROVISION FOR TEACHERS OF THE CHRISTIAN RELIGION.

Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge; and it is judged that such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies or communities of Christians;

Be it therefore enacted by the General Assembly, That for the support of Christian teachers, per centum on the amount, or in the pound on the sum payable for tax on the property within this Commonwealth, is hereby assessed, and shall be paid by every person chargeable with the said tax at the time the same shall become due; and the Sheriffs of the several Counties shall have power to levy and collect the same in the same manner and under the like restrictions and limitations, as are or may be prescribed by the laws for raising the Revenues of this State.

And be it enacted, That for every sum so paid, the Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid, keeping a distinct account thereof in his books. The Sheriff of every County, shall, on or before the day of in every year, return to the Court, upon oath, two alphabetical lists of the payments to him made,

distinguishing in columns opposite to the names of the persons who shall have paid the same, the society to which the money so paid was by them appropriated; and one column for the names where no appropriation shall be made. One of which lists, after being recorded in a book to be kept for that purpose, shall be filed by the Clerk in his office; the other shall by the Sheriff be fixed up in the Court-house, there to remain for the inspection of all concerned. And the Sheriff, after deducting five per centum for the collection, shall forthwith pay to such person or persons as shall be appointed to receive the same by the Vestry, Elders, or Directors, however denominated of each such society, the sum so stated to be due to that society; or in default thereof, upon the motion of such person or persons to the next or any succeeding Court, execution shall be awarded for the same against the Sheriff and his security, his and their executors or administrators; provided that ten days previous notice be given of such motion. And upon every such execution, the Officer serving the same shall proceed to immediate sale of the estate taken, and shall not accept of security for payment at the end of three months, nor to have the goods forthcoming at the day of sale; for his better direction wherein, the Clerk shall endorse upon every such execution that no security of any kind shall be taken.

And be it further enacted, That the money to be raised by virtue of this Act, shall be by the Vestries, Elders, or Directors of each religious society, appropriated to a provision for a Minister or Teacher of the Gospel of their denomination, or the providing places of divine worship, and to none other use whatsoever; except in the denominations of Quakers and Menonists, who may receive what is collected from their members, and place it in their general fund, to be disposed of in a manner which they shall think best calculated to promote their particular mode of worship.

And be it enacted, That all sums which at the time of payment to the Sheriff or Collector may not be appropriated by the person paying the same, shall be accounted for with the Court in manner as by this Act is directed; and after deducting for his collection, the Sheriff shall pay the amount thereof (upon account certified by the Court to the Auditors of Public Accounts, and by them to the Treasurer) into the public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever.

THIS Act shall commence, and be in force, from and after the day of in the year

A Copy from the Engrossed Bill.

JOHN BECKLEY, C. H. D.

*Washington Mss. (Papers of George Washington, Vol. 231); Library of Congress.**

*This copy of the Assessment Bill is from one of the hand-bills which on December 24, 1784, when the third reading of the bill was postponed, were ordered distributed to the Virginia counties by the House of Delegates. See Journal of the Virginia House of Delegates, December 24, 1784; Eckenrode, 102–103. The bill is therefore in its final form, for it never again reached the floor of the House. Eckenrode, 113.